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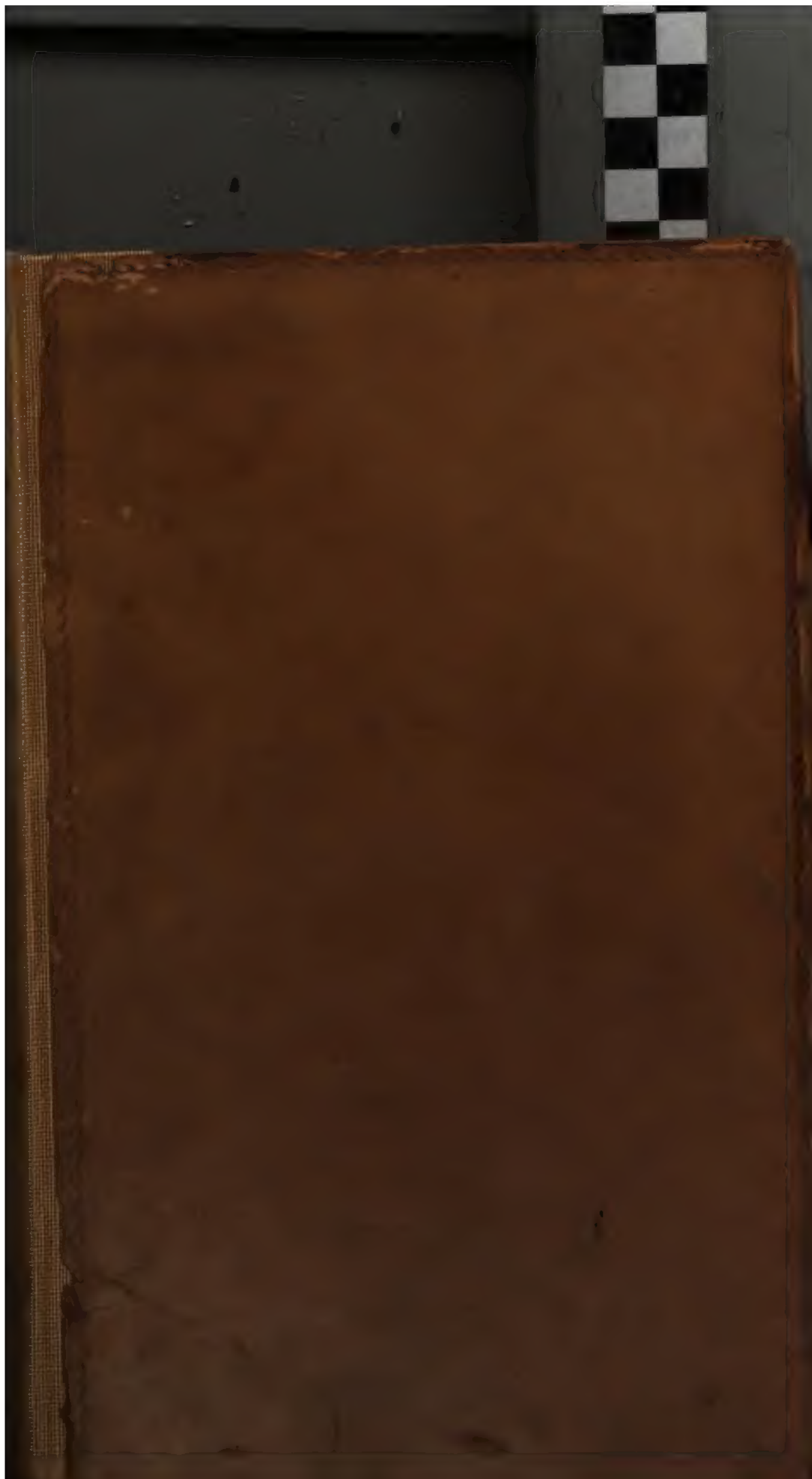
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8^o Jur.

A. 19. 9^c

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R E P O R T S
OF
C A S E S
ARGUED AND DETERMINED
IN
The Court of King's Bench.

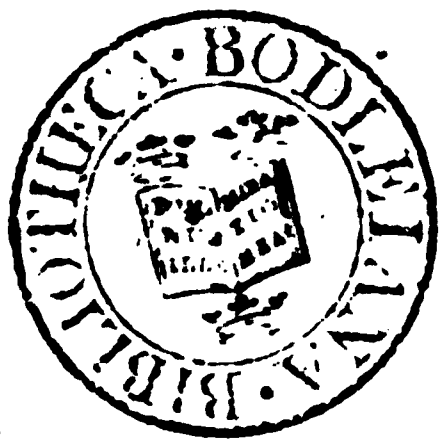
**WITH TABLES OF THE NAMES OF THE CASES
AND THE PRINCIPAL MATTERS.**

BY
RICHARD VAUGHAN BARNEWALL, OF LINCOLN'S INN,
AND
EDWARD HALL ALDERSON, OF THE INNER TEMPLE, ESQRS.
BARRISTERS AT LAW.

V O L. IV.

**Containing the Cases of MICHAELMAS, HILARY, EASTER, and
TRINITY Terms, in the 1st and 2d of GEO. IV. 1820, 1821.**

L O N D O N :
PRINTED BY A. STRAHAN,
LAW-PRINTER TO THE KING'S MOST EXCELLENT MAJESTY ;
FOR J. BUTTERWORTH AND SON, LAW-BOOKSELLERS, 43. FLEET-STREET ;
AND J. COOKE, ORMOND-QUAY, DUBLIN.
1821.



J U D G E S
OF THE
COURT OF KING'S BENCH,

During the Period of these REPORTS.

SIR CHARLES ABBOTT, Knt. C. J.
SIR JOHN BAYLEY, Knt.
SIR GEORGE SOWLEY HOLROYD, Knt.
SIR WILLIAM DRAPER BEST, Knt.

ATTORNEY-GENERAL.

SIR ROBERT GIFFORD.

SOLICITOR-GENERAL.

SIR JOHN SINGLETON COPLEY.

ERRATA.

- Page 97. line 14. after the word *in*, read *his*.
line 16. instead of *afferret*, read *faceret*.
line 18. instead of *viam*, read *vitam*.
181. line 21. instead of the word *afferret*, read *faceret*.
instead of *flagitiumve*, read *flagitiumve*.
line 24. instead of *viam*, read *vitam*.

A

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ARGUED AND DETERMINED

1820.

IN THE

Court of KING's BENCH,

IN

Michaelmas Term,

In the First Year of the Reign of GEORGE IV.

WOOKEY *against* POLE, Bart. and Others.

THIS was an action of trover for an exchequer bill, for the payment of 1000*l.* and interest. The defendants pleaded the general issue; and the cause coming on to be tried at the sittings in *London*, after *Michaelmas* term, 1818, before the Lord Chief Justice, a verdict was found for the plaintiff, subject to the opinion of the Court upon the following case :

The plaintiff was, on the 1st of *November*, 1817, proprietor and possessor of a legal and valid exchequer bill,

An exchequer bill, the blank in which was not filled up, having been placed for sale in the hands of *A.*, he, instead of selling it, deposited it at his banker's, who made him advances to the amount of its value. *A.* afterwards becoming bankrupt, it was

held by three Justices, *Bayley J.* dissentiente, that the owner of the exchequer bill could not maintain trover against the bankers, the property in such an exchequer bill, like bank notes and bills of exchange indorsed in blank, passing by delivery.

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 against
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worded and signed as follows, "No. 8333, 12 *May*, 1817. By virtue of an act of parliament quinquagesimo *Septimo Geo. 3.*, Regis, for raising the sum of 24,000,000*l.* by exchequer bills, for the service of the year 1817, this bill entitles or order, to one thousand pounds, with interest after the rate of 2½*d.* per centum per diem, payable out of the first aids or supplies to be granted the next session of parliament, and this bill is to be current and pass in any of the public revenues, aids, taxes, or supplies, or at the receipt of exchequer at *Westminster* after the 5th day of *April*. Dated at the Exchequer the 12th day of *May*, 1817. If the blank is not filled up, the bill will be paid to bearer.

"*Grenville*.

"N. B. The cheques must not be cut off."

Early in the month of *November* the plaintiff sent such exchequer bill by his wife to Messrs. *Pawsey* and *Eaton*, who were then stock-brokers, carrying on business in copartnership, for the purpose of being sold, and the wife delivered it to them, with orders to sell it for the plaintiff, and to invest the proceeds of such sale in 5 per cent. stock in the plaintiff's name. They, however, did not sell the exchequer bill as they were directed, nor did they buy any stock for the plaintiff, but took the bill so delivered to them to the defendants; (who carry on business in partnership as bankers, and with whom *Pawsey* and *Eaton* had a banking account,) deposited it with them, the same still continuing in blank as to the name of any payee, and in consequence of such deposit, got them to place to the credit of their banking account a sum of 800*l.* on the 7th *November* afterwards, and another sum of 200*l.* on the 8th of the same month, before the defendants had any knowledge

of the circumstances or terms upon which *Pawsey* and *Eaton* held the same bill; but the defendants did not place the exchequer bill to the credit of *Pawsey* and *Eaton*. The latter afterwards, at various times, paid in to the credit of their banking account with the defendants, monies amounting to 300*l.* and upwards, and also drew monies out at various times; and on the 27th *January*, 1818, they had drawn out of defendants' hands all the funds to their credit within 46*l.* 10*s.*, and the balance still remains unsettled. The plaintiff, as soon as he was informed of this misconduct of *Pawsey* and *Eaton*, being the 14th *January*, 1818, applied to the defendants, explained the facts, and required to have the exchequer bill in question delivered up to him; but the defendants refused to deliver it up to the plaintiff, saying they had advanced money to *Pawsey* and *Eaton* on its security. The defendants afterwards, on the 27th *January* aforesaid, sold the said bill on their own account, and received the proceeds.

The case was argued in last *Easter* term by

Sir *W. Owen*, for the plaintiff. The question in this case is, whether an exchequer bill is to be considered as money or goods. If it be of the latter description, it may be followed into the hands of a third person, unless it be transferred by the owner or under his authority, or by sale in market overt. In the case, indeed, of money, bank notes, or bills of exchange indorsed in blank, it has been held that trover will not lie against a third person, coming bonâ fide into possession and giving value; and the reason assigned for this is, because they are the circulation of the country, which would be impeded if pursued. They have a fixed value; money by royal proclamation, and notes and bills as the repre-

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representatives of money ; but exchequer bills constitute no part of the currency of the country, nor are they negotiable instruments. The exchequer bills are made for large sums, none under 100*l.*, and so not adapted for the purposes of currency. They are issued under acts of parliament, passed since the Revolution, and called in at certain times, and paid off. All exchequer bills of late years have been issued under various regulations, made by the 48 G. 3. c. 1., which have been recognised by the subsequent acts, and, among others, by the 57 G. 3. c. 2., under which this bill issued. Exchequer bills are sold in market overt as stock, varying in its value, being sometimes at a premium and at others at a discount. In *Nightingale, Assignees, v. Devisme* (a), it was decided that stock could not be considered as money, and in *Ford v. Hopkins* (b), which was an action for lottery tickets, *Holt* C. J. said, “ that if bank notes, exchequer notes, or million tickets are stolen or lost, the owner has such an interest or property in them, as to bring an action into whatsoever hands they are come.” Lord *Mansfield*, indeed, in *Miller v. Race* (c), considers the report in *Ford v. Hopkins* as incorrect in making Lord *Holt* speak of bank notes, exchequer notes, and lottery tickets, as like to each other ; but what Lord *Mansfield* says as to lottery tickets is applicable to exchequer bills ; he says, “ No two things can be more unlike than a lottery ticket and a bank note : lottery tickets are identical and specific. Specific actions lie for them. They may prove extremely unequal in value ; one may be a prize, another a blank. Land is not more specific than lottery tickets are. A bank note is constantly and universally, both at home and abroad, treated as *money*,

(a) 5 Burr. 2569.

(b) 1 Salk. 283.

(c) 1 Burr. 452.

as cash; and paid and received as cash; and it is necessary for the purposes of commerce, that their currency should be *established* and *secured*." None of these observations apply to exchequer bills, which, like stock, rise and fall in value. In *Maclish v. Ekins* (a), it was expressly decided that the property in a navy bill, which was payable to plaintiff and his assigns, would not pass without assignment. The period of the transaction in this case is material; for it takes place between November, 1817, and January, 1818, and this bill was not to be taken in payment for taxes till the 5th April, 1818. Till that time, therefore, it could not be considered as cash. Secondly, If an exchequer bill is to be considered in the nature of goods, then the stock-broker was an agent for selling the exchequer bill and investing the amount in 5 per cent. stock, and an agent employed in a specific act cannot bind his employer, unless his authority be strictly pursued. *Fenn v. Harrison* (b), *Paterson v. Tash* (c), *Newsom v. Thornton* (d), *Daubeny v. Duval* (e), *De Bouchot v. Goldsmid*. (f) This is a case of pawning by the broker; but if it had been a sale by him it would have made no difference, *Wilkinson v. King*. (g)

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Chitty, contra. This is a negotiable instrument, like a bill of exchange; it is transferable before it is due, and it is expressly stated, that if the blank be not filled up it will be paid to the bearer. Such an instrument must, therefore, in its very nature, be transferrable by delivery; and in *Goldsmid v. Gaden*, cited in *Collins v.*

(a) *Say*. 73.(b) 3 *T. R.* 757.(c) 2 *Strang.* 1178.(d) 6 *East*, 17.(e) 5 *T. R.* 604.(f) 5 *Ves.* 211.(g) 2 *Camph.* 335.

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Martin (a), it appears that the Lord Chancellor was of opinion that navy bills, indorsed in blank, passed by delivery; and in *Collins v. Martin* it was held, that the property in bills of exchange indorsed in blank, deposited with a banker, to be by him received when due, who raised money upon them by pledging them to another, passed to the pledgee, and that the banker having afterwards become bankrupt, the real owner could not recover the value. These authorities are expressly in point; for it is impossible to distinguish an exchequer bill, in which the blank is not filled up, from a bill of exchange or a navy bill indorsed in blank.

Cur. ad. vult.

The case stood over until this term, when there being a difference of opinion on the bench, the Judges delivered their opinions seriatim.

BEST J. The question which the Court is called on to decide is, whether exchequer bills are to be considered as goods, or as the representatives of money; and as such, subject to the same rules as to the transfer of the property in them as are applicable to money. The delivery of goods by a person who is not the owner (except in a manner authorised by the owner) does not transfer the right to such goods; but it has been long settled, that the right to money is inseparable from the possession of it. I conceive that the representative of money, which is made transferrable by delivery only, must be subject to the same rules as the money which it represents. It was said by the Court, in *Higgs v. Holiday*, *Cro. Eliz.* 746., “that where the owner of

(a) 1 *Bos. & Pull.* 649.

money.

money had lost the possession of it, he had lost the property in it, *because it cannot be known ;*" and Lord *Holt*, recognising this doctrine in the case of *Ford* and *Hopkins*, *Salk.* 283., adds, "but if bank notes, exchequer notes, million tickets, or the like, are stolen or lost, the owner has such an interest in them as to bring an action into whatsoever hands they are come." It is not because the loser cannot know his money again that he cannot recover it from a person who has fairly obtained the possession of it ; for if his guineas or shillings had some private marks on them by which he could prove they had been his, he could not get them back from a *bonâ fide* holder. The true reason of this rule is, that by the use of money the interchange of all other property is most readily accomplished. To fit it for its purpose the stamp denotes its value, and possession alone must decide to whom it belongs. If this be correct as to money, it must be so as to what is made to represent money, and Lord *Holt* has himself so decided. In an anonymous case, *Salk.* 126., he held that trover would not lie by one who had lost a bill of exchange against one who had given for it a *valuable* consideration. The same judgment was given in the case of a lost bank note in *Miller v. Race*, 1 *Burr.* 452. It cannot be disputed but that this exchequer bill was made to represent money, as much as a bank note or bill of exchange. It was given for a debt due from government ; it is payable (the blank not being filled up) to bearer, and transferrable by delivery ; and is on its face made *current, and to pass in any of the public revenues, or at the receipt of the exchequer.* But it has been said, these bills are not used as negotiable instruments, as bank bills and bills of exchange are ; but are the ob-

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jects of sale. I do not see why they should not be used as negotiable instruments: they are transferred with the same facility as other bills; and I know from the legislature that they may be used in payments, for the statutes direct that they should be received for taxes. We also know that bills of exchange are as frequently sold as they are delivered in payment. It is the business of bill-brokers to negotiate these sales. But the great point is, that they are not like goods taken on the credit of the person from whom you receive them, but on that of government. The receiver never enquires from whom they come, further than to satisfy himself that they are genuine bills. Indeed, when they are in blank, he has no means of ascertaining from whom they come. How could the defendants, in this case, find out that this bill had ever belonged to the plaintiff? It is the plaintiff's own negligence in not filling up the blank, that has rendered it impossible for the defendants to ascertain that he had any right to it; and it would, therefore, be inconsistent with law and justice that, under such circumstances, he should be allowed to call on them to make good the loss that has arisen from the fraud of his agent. It seems to be the opinion of Lord Chief Justice *Lee*, who pronounced the judgment of the Court of K. B. in *Hartop v. Hoare*, 3 *Atkyns*, 50., that there is no difference between *money*, *bank notes*, and *exchequer bills*. His Lordship observes, that Lord *Holt* had decided in *Ford v. Hopkins*, "that if money is stolen and paid to another, the owner can have no remedy against him that received it; but if bank notes, exchequer bills, or million tickets, or the like, are stolen or lost, the owner has such an interest or property in them as to bring an action into whatever hands they come."

come." Lord Chief Justice *Lee* says, "This must mean that the owner can bring an action into whatever hands they come, *without a valuable consideration* paid for them; for if it be not thus understood, what Lord *Holt* says here will not agree with his former opinion." This also gives me the authority of Lord *Holt* for saying that there is no difference between *bank notes* and *exchequer notes*; and the same learned Judge has decided that bills of exchange pass as money. Should the deposit of this bill with the defendants, under the circumstances in which it was deposited, be considered as pledging the bill, that circumstance will make no difference, if the property in the bill passes by delivery. In *Collins and Martin*, 1 *Bos. & Pull.* 648., a banker pledged bills, indorsed in blank, that had been deposited with him by a customer. The banker had no authority from the owner to part with these bills; but the Court held, that with respect to bills of exchange indorsed in blank *property and possession are inseparable*. The pawnee had a right to detain the bills until the sum raised on them by the bankers was paid. On these grounds, I think that a nonsuit should be entered in this case.

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HOLROYD J. It has been long and fully settled, that bank notes or bills, drafts on bankers' bills of exchange, or promissory notes, either payable to order and indorsed in blank, or payable to bearer, when taken *bonâ fide*, and for a valuable consideration, pass by delivery, and vest a right thereto in the transferee, without regard to the title or want of title in the person transferring them. This was decided, as to a bank note, in the case of *Miller v. Race* (a), as to a draft on a banker in *Grant*

(a) 1 *Burr.* 452.

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v. *Vaughan* (a), and as to a bill of exchange indorsed in blank, in *Peacock v. Rhodes*. (b) Those cases have proceeded on the nature and effect of the instruments, which have been considered as distinguishable from goods. In the case of goods, the property, except in market overt, can only be transferred by the owner, or some person having either an express or implied authority from him; and no one can, by his contract or delivery, transfer more than his own right, or the right of him under whose authority he acts. But the courts have considered these instruments, either promises or orders for the payment of money, or instruments entitling the holder to a sum of money, as being appendages to money, and following the nature of their principal. In the one case they are payable to the person, whoever he may be, who is the bearer or holder of the instrument; and so also in the other case, unless the payment is restrained by a special indorsement. In *Peacock v. Rhodes*, *Douglas* 636., Lord *Mansfield* says, "The holder of a bill of exchange, or promissory note, is not to be considered in the light of an assignee of the payee. An assignee must take the thing assigned, subject to all the equity to which the original party was subject. If this rule applied to bills and promissory notes, it would stop their currency." Again, he says, "I see no difference between a note indorsed in blank, and one payable to bearer." And in *Miller v. Race*, speaking of bank notes, he says, "They are not goods, nor securities, nor documents for debts, nor are so esteemed, but are treated as *money*, as *cash* in the ordinary course and transaction of business, by the general consent of man-

(a) 3 *Burr.* 1516.(b) *Doug.* 636.

kind,

kind, which gives them the credit and currency of money, to all intents and purposes: they are as much money as guineas themselves are, or any other current coin that is used in common payments, as money or cash." These authorities shew, that not only money itself may pass, and the right to it may arise by currency alone, but further, that these mercantile instruments, which entitle the bearer of them to money, may also pass, and the right to them may arise, in the like manner, by currency or delivery. These decisions proceed upon the nature of the property (*viz.* money) to which such instruments give the right, and which is itself current; and the effect of the instruments, which either give to their holders, merely as such, the right to receive the money, or specify them as the persons entitled to receive it. The question, then, is, whether these principles apply to the present case, or whether this exchequer bill and the right thereto, follow the nature of goods, which, except in market overt, can only be transferred by the owner, or under his authority? In order to ascertain that, we must consider the nature and effect of the instrument, both as to the property which it concerns, and as to its negotiability or currency by law. In its original state, it purports to entitle the holder to the sum of 1000*l.* and interest; and the original holder may, if he pleases, secure it to himself; but it is payable to the bearer, until some name is inserted, and when that is done, it becomes payable to such nominee, or his order. But if the original holder parts with it or keeps it in blank, he by that very act, or by his negligence if he loses it, authorises the bearer whoever he may be, to receive the money; and so, if he were to insert his own name, but indorse it in blank, instead of restraining its negotiability, either by not indorsing it at all, or by making

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making a special indorsement, he thereby authorises and empowers any person, who may be the holder *bonâ fide* and for value to receive it; and he cannot revoke that authority, when it has become coupled with an interest. The instrument is created by the stat 48 G. 3. c. 1., and is thereby made negotiable and current. By section 2. the commissioners of the treasury are to make out exchequer bills, in such manner and form as they shall direct; and after certain things are done, to put them into *circulation*. By section 5., they may be paid in to the receivers of taxes; and in section 13. are these words: “And for the better supporting the *currency* of the said exchequer bills, and to the end a sufficient provision may be made for *circulating and exchanging the same for ready money*, during such time as they or any of them are to be *current*, the commissioners of the treasury are empowered to contract with persons who will undertake to circulate and exchange them for ready money;” and by section 18., “on proof as therein specified, if any exchequer bill is lost, burnt, or destroyed, and on a certificate obtained, as therein mentioned, the commissioners of the treasury are authorised to pay the money, as if the bill had been brought in to be paid off, provided the payee gives security to pay into the exchequer, for the use of the public, so much as shall be paid him, if the exchequer bill shall be afterwards produced.” An exchequer bill is, therefore, an instrument for the repayment of money originally advanced to the public, purporting thereby to entitle the bearer to receive the money, put into circulation, and made current by law. It is not, therefore, like goods saleable only in market overt, and not otherwise transferrable, except by the owner, or under his authority, but is, in all those several respects, similar to bills of exchange and promissory notes,

notes, and transferrable in the same manner as they are. The case, therefore, stands thus: this exchequer bill was a current and negotiable instrument for the payment of money. Now money passes from one person to another, by reason of its currency; and for that reason only, and not because it has no ear-mark, it cannot be recovered from the person to whom it has been passed. The exchequer bill, therefore, seems to me, upon the same principle, to follow the nature of the money for which it is a security. The case of *Maclish v. Ekins* (a) has been cited, to which this is said to bear a resemblance. That case is very distinguishable from the present. It was the case of a navy bill, payable to the plaintiff, or his assigns, and not to bearer. By the very terms, therefore, of that instrument, the holder was not entitled to receive the money; and the question in that case went upon the ground of the want of an assignment; and there, too, the defendant received the navy bill under circumstances which shewed that he doubted the broker's authority to dispose of it. Here the brokers had a distinct authority to sell, and they might have sold the exchequer bill to the defendants as their own; and this is like the case of a bill indorsed in blank, payable to bearer, where the right arises from the instrument itself, and it is not necessary to deduce the title through the intermediate holders; and in that case, *Collins v. Martin*, 1 Bos. & Pull. 648., is a distinct authority to shew, that if the party with whom such bills are deposited, raise money upon them by pledging them with A., the owner cannot afterwards maintain trover for them; and the authority of that decision was confirmed in *Truettel v. Barandon*, 1 B. Moore, 543.

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(a) *Sayer*, 73.

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Now if it be clear, that this exchequer bill follows the nature of bills of exchange payable to bearer, these authorities are expressly in point to shew, that the brokers might pledge this exchequer bill, and by the delivery of it transfer the property in it to the defendants. Upon these grounds, it seems to me that there ought to be judgment of nonsuit.

BAYLEY J. This was an action of trover for an exchequer bill. The bill was dated the 12th *May*, 1817, and purported to be payable out of the first aids to be granted the then next session of parliament, and to be current in any of the public revenues and taxes after the 5th *April*. The form of the bill was, "This bill entitles or order to 1000*l.*, with interest at 2½*d.* per day," and it had a memorandum at the foot, that if the blank were not filled up, it would be paid to bearer. This bill belonged to the plaintiff, and early in *November*, 1817, he sent it to *Pawsey* and *Eaton*, stockbrokers, that they might sell it on his account, and invest the amount in his name in five per cent. stock. They did not sell the bill or buy the stock, but deposited it with the defendants, who were their bankers, and the defendants, upon the faith of such deposit, carried to the credit of *Pawsey* and *Eaton* 800*l.* on the 7th, and 200*l.* more on the 8th *November*. On the 27th *January*, 1818, *Pawsey* and *Eaton* had exhausted these sums and 300*l.* more to within 46*l.* 10*s.*, and their balance with the defendants still remains unsettled; and the question is, whether this wrongful deposit by *Pawsey* and *Eaton* will give the defendants a right to withhold the bill against the plaintiff, the right owner. Had *Pawsey* and *Eaton* sold the bill to the defendants in the usual and ordinary course of dealing, there can be no doubt that they would

would have had good title to the bill, because *Pawsey* and *Eaton* would have been acting within the scope and limits of the authority conferred upon them by the plaintiff, which was an authority to sell. The neglect of *Pawsey* and *Eaton* to apply the money to the purpose prescribed, would not have invalidated the defendant's title, unless they had lent themselves to the fraud of *Pawsey* and *Eaton*, because the sale of the bill was to precede the purchase of the stock, and to be an independent transaction; and had *Pawsey* and *Eaton* sold the bill, the plaintiff who trusted them with the application of the money must have borne the loss if they misapplied it. But though *Pawsey* and *Eaton* could have conferred a good title by sale, because they were authorised by the plaintiff to sell, the question is, could they confer a good title by deposit? A pawnee of goods or chattels, or a vendee out of market overt, has in general no better title than his pawner or vendor, and cannot resist the claim of the rightful owner; but bank notes and bills of exchange stand upon a different footing in this respect from ordinary goods and chattels. The holder, *bonâ fide*, and for a valuable consideration, of a bank note or bill of exchange, has a good title against all the world; because, in the case of bank notes, they are considered as money, and pass as such, and it is essential for the purposes of trade, that delivery should give a perfect title, and because in the case of bills of exchange, this is the law and custom of merchants; and it makes no difference in case of bank notes or bills of exchange, whether such holder has received them as pawnee or otherwise, *Collins v. Martin*. (a) The question here is, whether such a bill as this is to stand upon the footing of bank notes or bills of exchange, or upon

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(a) 1 *Bos. & Pull.* 648.

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that of ordinary goods and chattels, and it seems to me that it stands upon the footing of ordinary goods and chattels, not upon that of bank notes or bills of exchange. The holder of a bank note or bill has, in general, no muniment to shew his title; the holder of an exchequer bill generally has the broker's note, stating the fact and particulars of the purchase. If the holder buys of the government broker, he gives him a broker's note; if he buys of any other broker, that broker does the same. The only case in which he does not buy of a broker and get a broker's note, is where he exchanges at the Exchequer an old bill for a new one; but then he will retain the note for the bill he gave up in exchange. In this case, therefore, had the defendants asked *Pawsey* and *Eaton* for their broker's note, they would have found they had no title. Bank notes and bills of exchange are passed from hand to hand, from one proprietor to another, in all parts of the kingdom, and are used as the media of commercial payments. The sale of exchequer bills is confined, almost exclusively, to *London*, and to one particular part of *London*, the Stock Exchange. That, as I apprehend, is the market overt for sale of such bills; and a sale there will, I take it, give the same security to the buyer which other sales in market overt give. There is no market overt for bank notes and ordinary bills of exchange, and they therefore require a protection which exchequer bills do not. Considering exchequer bills, therefore, as differently circumstanced from bank notes and bills of exchange, and upon the same footing as other saleable goods and chattels, it follows that a pawnee thereof will not have a better title than the pawner. The cases to this effect are many, and not disputed. And even if this were not the case *in general*, I think it would be so, under the circumstances of this case. *Pawsey*

and *Eaton* were stockbrokers; the defendants knew that they were so; it is part of the business of stockbrokers to sell exchequer bills for others, and when they offered this deposit, the defendants should have enquired in what character they held this bill; whether as owners or as agents, and the result of the enquiry might have been a discovery of the truth. It was urged in argument that by filling up the blank in the bill, and making a proper indorsement on the bill, the plaintiff might have prevented the fraud upon the defendants, and no doubt he might if he had inserted his own name in the blank, and had indorsed it "to the vendee of *Pawsey* and *Eaton*," but it does not follow, because he might have prevented fraud by these means, that he is to bear the loss for not having used them. Had such indorsement been usual, the neglect to take the ordinary precaution might have thrown the loss on the plaintiff; but to make him bear the loss, it should be shewn that that is a common precaution. I think no stress can be laid upon the memorandum on the bill, "if the blank is not filled up the bill will be paid to bearer;" that does not imply that a bonâ fide bearer shall have a right against the proper owner, but that payment, under such circumstances, to the bearer should discharge government. I lay no stress upon *Maclish v. Ekins*, *Say*. 73., because there the bill was payable to plaintiff or his assigns, and the plaintiff had never indorsed or assigned it, or authorised an assignment. In *Goldsmyd v. Gaden* (a) the broker had bought the navy bills and scrip, as agent for the defendants, and they left the navy bills and scrip in his possession; so that he had all the muniments of title,

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(a) 1 Bos. & Pull. 649.

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and common inquiry would not have detected his want of title, and it was from want of proper caution, viz. the taking of the possession of the muniments from him that he was enabled to impose upon the plaintiffs. Upon the whole, on the ground that exchequer bills are not bills of exchange; that it is not necessary for the purposes of trade that they should stand on the same footing as bills of exchange; that in the case of exchequer bills, there are muniments of title, which will shew in whom the title is; and that the defendants were guilty of negligence in not ascertaining whether *Parsey* and *Eaton* had the proper muniments of title; I am of opinion, that they have no right to these bills, and that the plaintiff is entitled to recover.

ABBOTT C. J. I am of opinion that a nonsuit ought to be entered. The question in the present case is, whether the transfer of the property in an exchequer bill is to be governed by those rules, which regulate the transfer of property in bank notes and bills of exchange, originally made payable to the bearer, or become so payable by the effect of an indorsement, according to the custom of merchants; or by those rules which regulate the transfer of the property in goods and chattels. If by the former, the authorities are clearly against the plaintiff; if by the latter, they are as clearly with him. Upon this question my mind has fluctuated; but I am ultimately of opinion that the transfer is to be governed by those rules, which apply to notes and bills of exchange. I do not rely upon the case of *Goldsmyd v. Gaden*, cited in 1 *Bos. & Pull.* 649. because the facts of that case are not given with sufficient fullness and perspicuity to enable me to judge of the

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the ground and principle of the decision. But, abstracted from authority, I think this instrument is of the same nature as notes and bills of exchange. Like them, it is neither valuable nor useful in itself, as goods and chattels, such as a horse, a book, a picture, or a pipe of wine, are; it is valuable only as entitling the holder to receive, at some future time, a certain sum of money, which is a value precisely of the same nature as the value of a note or bill. Notes and bills have been distinguished from goods in regard to their transfer, for the convenience of trade and commerce, and in regard to their being mercantile and commercial instruments, and by law negotiable. It may be true, that exchequer bills are not so frequently negotiated, in fact, as some other bills or notes; but I think we are to regard the negotiability of the instrument, and not the frequency of actual negotiation; exchequer bills are not made for very small sums, and on that account alone they would not become the subject of frequent actual negotiation. A bank note for £1000. passes through very few hands; a bank note for 5s. usually passes through a great number. Many country bank notes have no ordinary circulation beyond a very narrow district. Bills of exchange usually pass through very few hands; but the character of these instruments is in no degree affected by those circumstances. In the case of *Grant v. Vaughan* (a), which arose upon a draft on a banker, payable to the ship *Fortune* or bearer, the Court held that it ought not to have been left to the jury to say whether such drafts were in fact and practice negotiable, for that the question whether a bill or note be negotiable or not is a question of law. And upon such a question of law,

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(a) 3 Burr, 1526.

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regarding an exchequer bill, I should, looking at the form of the instrument, and observing that the money is to be payable to the bearer, answer, that it is by law negotiable. I believe, also, that exchequer bills are in fact negotiated in like manner as other bills or notes, though not to the same extent, or among all people generally, but confined chiefly to those who deal in money. And I have already said, that I think the frequency or extent of actual negotiation is not to be regarded. It was objected, however, at the bar, that there are words which shew, that this instrument was not to be negotiable before the fifth of *April*, which day had not arrived when it was deposited with the defendants. But I think the words have no such import. They are affirmative that the bill will be received as a payment at the Exchequer after the fifth of *April*, which may reasonably lead to a conclusion in the negative, that it will not be received in payment *there* before that day. But compulsion to receive an instrument in payment is not by any means requisite to give to it the character of a negotiable instrument. No man is compellable to take a bill of exchange in payment. It was also objected, that exchequer bills are the subject of sale, and usually are transferred by sale. This is true in fact, but I think the fact does not affect the character of the instrument; for bills of exchange also are often made the subject of sale, and are actually transferred by sale. For these reasons, I am of opinion that exchequer bills are negotiable, and may be transferred in the same manner as bills of exchange; and that in those bills, as in bills of exchange, the property passes with the possession by every mode of transfer, fraud and collusion apart. And I think this opinion is most consonant to public policy, which requires the utmost facility

facility of transfer, because the value is in some degree increased thereby; though I should not think myself justified in deciding the case upon the ground of public policy alone. It will be understood that I have been speaking of exchequer bills, in which the blank is not filled up with any name, and which, therefore, according to the note at the foot, are to be paid to the bearer.

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Judgment of nonsuit.

BATSON and Others *against* DONOVAN and
Others.

DECLARATION against the defendants, as common carriers, to recover the value of a parcel, containing 4072*l.* in bank notes and bills of exchange, delivered to them for the purpose of being conveyed from *Berwick-upon-Tweed* to *Newcastle-upon-Tyne*. Plea not guilty. At the trial, before *Bayley J.*, at the *Northumberland* Summer assizes, 1819, the jury found a verdict for the defendant. The facts of the case, and the points left to the jury by the learned Judge, are very fully stated by him, in delivering his opinion; and, therefore, it becomes unnecessary to state them here. A rule *nisi* for a new trial having been obtained in last *Michaelmas* term,

A carrier had given notice that he would not be answerable for parcels of value, unless entered and paid for as such; and the plaintiffs, with the knowledge of this, delivered a parcel, containing bank notes to a large amount, without informing the carrier of its contents. The coach in which the parcel was conveyed, was left, at midnight, standing for some time, in the middle of a very wide street, with a porter, who was or-

Cross Serjt., in *Trinity* term last, shewed cause. The defendants, in this case, by their notice, have

dered to watch it; during this time the parcel was stolen. At the trial, two questions having been left to the jury, first, whether the plaintiffs had been guilty of any unfair concealment, by not informing the carrier of the nature and value of the parcel, and, secondly, whether the carrier had been guilty of gross negligence: Held, by three Judges, (*Best J.* dissentiente,) that the direction to the jury was right.

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declared, that they would not be liable for parcels of a certain value, unless they were entered and paid for accordingly. The plaintiffs, who had frequently sent parcels of value by the defendants, and paid for them as such, did not deal fairly with them, in concealing from them the value of the parcel in question. By that concealment, they deprived the Defendants of the increased remuneration, which they were entitled to for the increased risk. In *Tyly v. Morrice* (a), the plaintiffs had delivered to a common carrier a bag, sealed up, which they represented to contain 200*l.*, but which, in fact, contained 400*l.* The carrier received 10*s.* per cent. for the carriage and risk of the 200*l.* It was ruled at *nisi prius*, that the carrier was answerable only for the 200*l.*, because the undertaking was for the carriage of 200*l.*, only, and his reward was to extend no further than that sum, and it is the reward which makes the carrier answerable; and, since the plaintiffs had taken this course to defraud the carrier of his reward, they had barred themselves of that remedy, which is founded only on the reward. In *Gibbon v. Paynton* (b), 100*l.* hid in hay, in an old nail bag, was delivered to a carrier, he having given public notice, knowledge of which was traced to the plaintiff, that he would not be answerable for money and jewels, without notice; it was held, however, that the carrier was not answerable, because the plaintiff had been guilty of a fraud, in concealing the money from the carrier. *Nicholson v. Willan* (c), is an authority to shew that such notices are legal. In *Beck v. Evans* (d), it was held, that the carrier did not, by these notices, protect himself from the consequences of

(a) *Carthew*, 485.(b) 4 *Burr.* 2298.(c) 5 *East*, 507.(d) 16 *East*, 244.

his own misfeasance; here, however, the loss has arisen from the negligence of his own servants, one of the ordinary risks to which a carrier is subject, and from the consequences of which he must have intended to protect himself, in cases of parcels of value, by his notice. The cases decided on the subject of concealment, with respect to policies of insurance, apply to the present case, for this is in the nature of insurance. Now if the assured conceal from the underwriter any fact within their knowledge, materially varying the nature of the risk, the policy is void. The question whether a carrier has been guilty of gross negligence, must, in some degree, depend upon the value of the property committed to his care; and, therefore, the knowledge of that value is to him of the utmost importance; for that which might be considered sufficient care, with respect to property of ordinary value, might justly be considered insufficient in the case of money or jewels.

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Hullock Serjt., J. Williams, and Holt, contra. This verdict cannot be supported, because the carrier is responsible for all losses happening through his personal default, although he may have given notice that he will not be answerable for parcels of a given value. The first question left to the jury in this case, assumes, that persons sending articles of value, are bound to give notice of the value to the carrier. That proposition, however, is not supported by any decided case, nor is it recognised as the law of *England*, by any text writer. The exceptions to the common law responsibility of carriers, are, where the loss proceeds from the act of God or the king's enemies, to which, perhaps may be added, those cases where a party delivering goods to a carrier, fraudulently conceals from him their value,

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value, and thereby deprives him of his reward. In *Kenrig v. Eggleston* (a), the plaintiff delivered a box, containing 100*l.*, to the carrier, telling him only that there was a book and tobacco in the box; and *Rolle C.J.* held, that the carrier was answerable, for he need not inform the carrier of all the particulars of the box, but it must come on the carrier's part, to make special acceptance. In *Morse v. Slue* (b), a box with a large sum of money was brought to a carrier, who asked the owner what was in it; he answered, that it was filled with silks and such like goods, of mean value, upon which the carrier took it, and was robbed; it was held, that he was liable, but it was said, that if the carrier had told the owner that it was a dangerous time, and if there was money in it, he durst not take charge of it, and the owner had answered as before, this would have excused the carrier. These cases are authorities to shew, that the carrier, in order to excuse himself, must make a special acceptance. It is true, indeed, that Lord *Mansfield*, commenting in these two cases in *Gibbon v. Paynton*, said, that he did not agree in the doctrine there laid down, for he considered them both as cases of fraud. That was also a case of fraud, and the means used to impose upon the carrier, were equivalent to an actual representation, that the bag contained nothing but hay. Here there is no imputation of fraud; negligence in the plaintiffs or their servants, in not communicating the value of the parcel, is alone insinuated; and the doctrine, therefore, laid down by Lord *Mansfield*, in the case last cited, does not apply here. If it be the duty of a party to notify to a carrier the value of a parcel,

(a) *Allyn*, 93.(b) 1 *Ventris*, 238.

how is it possible to draw a line between those cases, where such notice is necessary and where it is not? Must notice be given when the parcel contains linen or muslin, or silk, or only when it contains money or jewels. The safe rule to lay down is, that carriers are always liable, except in the case of fraud. Secondly, it is clear, that a carrier is liable for the consequences of his gross negligence, notwithstanding he may have otherwise restrained his responsibility by notice; for it has been expressly held, that these notices only go to protect him in cases of ordinary accidents, and not from the consequences of his own misconduct. *Beck v. Evans* (a), *Bodenham v. Bennett* (b), *Birkett v. Willan* (c), are authorities in point, and that being so, it follows, that if the defendants were guilty of gross negligence, the plaintiffs were entitled to recover, although they had not disclosed to them the value of the parcel. They then argued, from the facts proved at the trial, that there had been such negligence in the defendants.

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Cur. adv. vult.

The case stood over until this term, when there being a difference of opinion on the Bench, the Judges delivered their opinions seriatim.

BEST J. This action was brought against the defendants, as common carriers, to recover a compensation for the loss of a box, containing bills and bank notes to the amount of 4072*l.* which had been lost out of a stage coach, of which they were the proprietors. The defendants had given notice that they would not be

(a) 16 *East*, 244.(b) 4 *Price*, 31,(c) 2 *B. & A.* 356.

answer-

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answerable for parcels of value, unless entered and paid for as such. The plaintiffs knew of this notice. The box was left with one of the defendants, at *Berwick*, and booked. Nothing was said at the time of the booking, but that it was *the box* for *Newcastle*. The box was addressed to *Wm. Batson and Co. Newcastle*, and had on it a brass plate with the words "*Batson and Co.*", *William Batson and Co.* were bankers, both at *Berwick* and *Newcastle*. The coach arrived at *Berwick* at twelve at night, and remained half an hour in the *middle* of the street, which is of the width of 80 yards. About a quarter after twelve the box was put into the boot of the coach. A porter was ordered to watch the coach, but this person was at a considerable distance from it, and was so inattentive to his duty that the box was stolen from the coach whilst it was so left in the street, and so watched by the porter. My Brother *Bayley* (who tried this cause) left two questions to the jury, viz. 1st, Whether the plaintiffs dealt fairly by defendants in not apprizing them that the contents of the box were of great value; 2dly, Whether there was in the conduct of the defendants gross negligence. My learned Brother told the jury that if they thought the concealment on the part of the plaintiffs was unfair, or that the defendants were not guilty of gross negligence, they should find for the defendants. My single opinion will not affect the rights of these parties; but I feel it my duty to make my humble protest against the introduction of what I think a new principle in the law relative to carriers, viz. that the owner of a parcel of value, such parcel having nothing in its appearance indicative of its contents being of small value, is bound, unasked by the carrier, to state what is its worth. I
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am also bound to declare, that the directing the jury that they must find a carrier guilty of gross negligence without any qualification or explanation of what is meant by these terms before they fix him with the loss of a parcel is going much further in his favour than, I think, his liability under the law will warrant. I know of no case in which a Judge has told the jury that they are to consider whether the owner of a parcel made a proper disclosure of the nature of its contents, either to a carrier or innkeeper. The novelty of such a direction is of itself sufficient to make me pause before I admit its propriety. A carrier who has given no notice is an insurer. Now if a man caused an insurance to the amount of 100*l.* to be effected upon a thing worth 20,000*l.*, can it be said that it is necessary, at the time of effecting the policy, to state to the underwriter the value of the thing insured? Yet the large value in a small compass may tempt thieves to make attacks in rivers and harbours as well as on stage coaches. If the underwriter or carrier want information, they must ask it; and, according to their discretion, protect themselves by warranties or special acceptances. What is to be considered as a parcel of such value, or what are the particular articles that require caution to be given to the carrier? Must it be of the value of 1000*l.* or 100*l.* or 10*l.*? Must it contain jewels or gold? or is the carrier entitled to this indulgence in case a package contains silver, or silks, or laces? None of these points have ever been settled, and they would have been settled long ago if this direction had been usual and proper, and then the decision would have been matter of law for the Judge, and not of fact for the jury. If any fraud be practised on the carrier, the case would

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'be different; but I cannot consider the non-communication of the contents of a box as any thing like fraud. Any artifice to give the box containing the things of value a mean appearance, and thereby to induce the carrier to think it of no value, and so prevent him from making enquiries, would, I think, be pregnant proof of fraud. Before it was the practice for carriers to give notice, that they would not be answerable for parcels above a certain value, unless entered and paid for according to their value, a carrier was an insurer against all losses, except such as were occasioned by the act of God, or the king's enemies. This responsibility (as it is said in all the old books) *was in respect of his reward*. That reward must vary, not only according to the weight and dimensions of the parcel and the distance it is to be carried, but also according to its value. The carrier is entitled to have this reward paid to him before he takes the package into his custody. He always was at liberty to make a special acceptance of the goods, and to introduce into the terms of such acceptance any reasonable condition not inconsistent with his duty to the public. To enable him to make a proper charge for the carriage, he is entitled to ask of the owner what is the value of the parcel. If these are his rights, is it not his duty to make these enquiries? and is he not, like persons in any other station, bound to know the duties belonging to that station? Has he then any right to complain that information was not given him when he did not do what he was bound to do to obtain that information? If carriers will make the proper enquiries of those who employ them, they will find they may protect themselves against frauds and accidents more effectually than by notices; for if the answers to enquiries represent the

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contents of a package as of less value than they are, the carrier will not be liable for more than the value stated by the owner. If the representation be true, he knows the degree of care that such a package requires, and what he may reasonably demand as a compensation for that care, and the risk that he must run in carrying the parcel. Supposing, therefore, the defendants had given no notice, the plaintiffs, unasked by the defendants, were not bound to say a syllable as to the value of the box. The only effect of the notice is to prevent the necessity of a particular enquiry in each case. By these notices their employers are informed that carriers will not be insurers for goods above a certain value, unless paid a reasonable premium of insurance. But these notices do not affect their responsibility as to negligence or misfeasance. It has been said at the bar, that if the carrier is informed that it is a parcel of great value, he will be more careful of it. I have already said, that if there had been no notice, and the carrier stood in the situation of an insurer, and he wished to proportion his care to the value of his charge and the greatness of his responsibility, he is not entitled to such information respecting a package, unless he thinks proper to ask for it. The notice renders any information as to the value of no importance. Having given such a notice, he is no longer an insurer, except of parcels under the value of 5*l*. Whatever be the value of a parcel delivered to a carrier, who has given such a notice, if he and his servants pay that attention to the safety of his carriage and the packages in it, that a coach loaded with packages, each being under 5*l*. value, requires, he is free from all responsibility. If he or his servants fail to pay that attention, and a parcel should be lost in
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consequence of the negligence, for that negligence he is responsible, whatever be its amount. With the greatest deference to my learned Brother who tried this cause, the jury (being told that they were only to consider the value of the box when they were deciding on the damages to be given) should only have been asked whether they thought the defendants had sufficiently guarded a coach containing many parcels, each of small value, whilst it was left without horses in the street at *Berwick*. On the second point, I am of opinion that the jury should have had some explanation of what is meant by *gross negligence*. Without some explanation, they would think that it means conduct highly blameable. Yet something much short of that sort of conduct will be sufficient to make a carrier responsible. He and his servants must take all the care that is necessary for the preservation of the property committed to his charge. They must take the same care of it that a prudent man would take of his own property. This is the law with respect to all bailees for hire or reward. Can I say that such care was taken of this property when I find the coach was left in such a situation in the street, that the owners thought it right to place some one to watch it, and that person was either at so great a distance from the coach, or so inattentive to his duty, as to allow persons to go to the coach and steal the box. *Gibbon v. Paynton* (a) has been referred to; but there is this difference between that case and the present, namely, that in that case the gold was packed in an old nail bag, which was stuffed with hay to give it a mean appearance. The whole Court

(a) 4 Burr. 2298.

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very properly considered that this mode of packing so valuable an article was a fraud, and gave their judgments expressly on that ground. There is a difference between silence and any act done to conceal. The latter may be fraudulent; the former never can. This is a case of silence only. For these reasons, I am of opinion that there ought to be a new trial.

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HOLROYD J. If the carrier had given no notice in this case, that he would not be answerable for parcels of value, it seems to me that it would not have been the duty of the plaintiffs, when they brought goods to him, to specify their quality or value; for then it would have been his duty to make enquiry, if he either wished to have a reward proportionate to their value, or to know whether they were goods of that quality for which he had a sufficiently secure conveyance; for if he had not, he might lawfully have refused to take them. In this case, however, the carrier had, by his notice, expressly refused to accept parcels of value without being paid for them accordingly. The reason for his giving such notice is, on account of the risk in the carriage, that he may claim an adequate reward for it, and also that he may use due care and be provided with sufficient means to guard against any loss. With respect, therefore, to the goods which he takes, he requires a remuneration in proportion to the value. Now the plaintiffs, knowing this, delivered the box in question, containing notes and bills, which the carrier had, by his notice, refused to take, unless entered and paid for accordingly, and they delivered it without giving him any information as to its contents. They held it out, therefore, to him as an ordinary article, which he would have no objection to take

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take as of course. That is a material circumstance in this case, and makes it very distinguishable from those cases where no notice is given by the carrier, or if given, is not known by the plaintiffs; for unless the notice had been brought home to their knowledge, they would be in the same situation as if there had been no notice at all. In cases where the carrier has not given notice, or where the notice does not come to the knowledge of a plaintiff, he holds himself out, as a common carrier, to take goods in general; and he would then be bound to enquire the value, either if he expects an additional reward, or if he has any objection to carry any particular article. But that reason does not apply to a case where the owner of the goods had notice that the carrier would not be responsible for goods of a particular description. Perhaps, indeed, the carrier might not have a right absolutely to refuse taking goods of this description. I by no means say that he has. It has been laid down, that where a carrier has convenience to carry goods, he cannot refuse to take the goods of any particular person; and, possibly, an action might lie against him if he refused to take such goods, without a sufficient reason for the refusal. It would, however, be a reasonable excuse for not carrying goods of great value, either if it appeared that the carrier did not hold himself out as a person ready to convey all sorts of goods, or that he had no convenient means of conveying with security such articles. And so it was held in *Jackson v. Rogers*. (a) Here the plaintiffs knew that the carrier refused to take goods of this quality, unless entered and paid for accordingly; and yet they delivered

(a) 2 Show. 327.

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them as things which the carrier was to take as of course. Now, I think it was the duty of the plaintiffs, in bringing such articles to the carrier, not to deliver them as ordinary goods, but to inform him of their nature and value; and the not doing so appears to me as direct an act of concealment as that in the case of *Gibbon v. Paynton*, where the circumstance of placing money and other valuable articles in hay, so as to make the carrier believe that no such articles were there, was held to be a fraudulent concealment. For a concealment may be effected not merely by direct acts done by a party himself; but likewise by his not doing what it is his duty to do, and, by that, deceiving the person to whom he brings the goods. Here, the owner of this valuable property delivered it as an article requiring no extraordinary care; he held out, therefore, to the carrier, as plainly as if he had told him so, that these were goods which the carrier would not object to take on the ordinary terms, and that he was to consider them as such. The carrier had, then, every reason to think that they were articles to which the notice did not apply; for, otherwise, he would have had a right to expect that their quality would be specified. And why was the nature of the goods not mentioned? Because the carrier would either have refused to take the goods, or, if he did consent to carry them, would have demanded a higher premium. The owner of the goods, therefore, withheld that knowledge which it was his duty to have given, and that in point of law was a concealment on his part. Then the question arises, whether there was a misdirection. The learned Judge left two points to the jury; 1st, Whether there was negligence in the plaintiffs' not specifying the contents of the

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box to the carrier; 2dly, whether there was gross negligence in the defendants. With respect to the first, I think it was the plaintiffs' duty to specify the contents, and that it was a fraud and deceit in law on his part in not doing so. In my opinion, the carrier cannot be considered as having consented to receive and carry these articles, by reason of the notice which he had given, and his ignorance of their quality. I think, therefore, he is not answerable as a carrier, nor even as a bailee, on account of the legal fraud of which the plaintiffs were guilty. The maxim, "Ex dolo malo non oritur actio," applies to this case. The second question is, Whether there was gross negligence on the part of the defendants. I think that question was properly left to the jury, and that we cannot say, upon the evidence, that they have drawn a wrong conclusion. I think, therefore, that the verdict ought to stand.

BAYLEY J. The box, in this case, contained bills, cheques, and notes of the value of 4072*l*. The defendants had given notice that they would not be answerable for parcels of value unless they were entered and paid for as such. The plaintiffs knew of this notice. The box was left with one of the defendants at *Berwick*, with no other observation than this, "It is the box for *Newcastle*." Nothing was said as to what it contained, nor did any of the defendants know it contained articles of value. It was directed, "*Wm. Batson, Newcastle*," and had on it a brass plate, "*Wm. Batson and Co.*;" it was locked and corded, not sealed. *W. Batson and Co.* were bankers at *Berwick* and *Newcastle*. The coach arrived at twelve, and stayed at *Berwick* half an hour; it stood in the middle of the street, about thirty yards from the
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pavement. About a quarter after twelve, the box was put into the boot of the coach, and a porter watched the coach; but he was not so attentive as he might have been, and the box was probably stolen from the boot whilst he was upon the watch, by some person who contrived to elude his notice. The horses were brought to the coach about ten minutes after the box was put in, and till that time nobody was with the coach, except the porter. There was no *misfeasance* in the defendants or any of their servants. I left, I believe, these two questions to the jury. First, whether the plaintiffs dealt fairly by the defendants, in not apprising them that the box contained articles of value; and, secondly, whether, in the case of a parcel of such value as the defendants might fairly expect this to be, there was gross negligence in the defendants; and I rather think I left those questions in such a way, that unless the jury were with the defendants on both, they should find for the plaintiffs; but I am not confident upon that point. And unless the first of these points, that the plaintiffs did not deal fairly by the defendants, in omitting to apprise them of the value of the box, will, under the circumstances of this case, sustain the verdict, I think there ought to be a new trial. This was a case of negligence only, not of *misfeasance*. Such want of fair dealing on the part of the plaintiffs is an answer to the action. There may be two objects in such a notice as this; the one, to secure to the coach-proprietor a compensation proportional to his risk; the other, to enable him to put parcels of the greatest value in a place of the greatest security. The risk upon a parcel of great value, is greater than that upon a small one. The value is a temptation to thieves to make attempts which, but for that value, they would not

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make. The omission, therefore, to apprise the coach-proprietor of the value, operates in two ways. It deprives the proprietors of the extra compensation they ought to have, and it prevents them from taking that extraordinary caution which, upon a parcel of extraordinary value, they naturally would take. The value is an ingredient to be taken into consideration upon the question of gross negligence; for that may be gross negligence in the case of a parcel of extraordinary value, which, in the case of another parcel, would not be so. The trusting a parcel of 5000*l.* or 10,000*l.*, for a moment, out of the personal care and superintendence of a trust-worthy servant, would, if it were stolen during that interval, be gross negligence; but the trusting a parcel of 40*s.* value in the same way would not. Why? because parcels of great value are a great temptation to thieves to be on the watch for them; parcels of small value are not. In the case of a box or parcel known to be of great value, the proprietors may take the extraordinary care of putting it into the personal charge of the coachman or guard, or even of sending a special messenger with it, or going with it themselves; and these are precautions which, in the case of a thing of ordinary value they would not think of taking. Now, if a plaintiff, by omitting what he ought to do, prevents a defendant from taking that extraordinary care which, but for that omission, he probably would have done, has he a right to complain? To what is the loss to be ascribed? To his omission. It is upon him, therefore, that the loss ought to fall. Had the defendants been apprised that this box contained the value of 4072*l.*; that so very large an inducement was held out to thieves, and that the loss of it would make them answerable to that extent, can any one

one believe that they would not have taken more care of it, than they did? Then the persons who prevented them from taking this extra care, viz. the plaintiffs, ought to bear the loss. Again, if this parcel had been of the value of 5*l.* only, it probably would not have been lost. The temptation to thieves would have been less. The value, however, makes it above an ordinary risk. Now the holding out as an ordinary risk what is really an extraordinary one, is a legal fraud, “*dolus malus*,” and, “*ex dolo malo non oritur actio*.” A carrier is, to a certain extent, an insurer, and concealment, if it varies the risk, discharges the underwriter. The value here does increase the risk; that value is concealed, it is concealed wrongfully; then why is the defendant to be liable? The case of *Gibbon v. Paynton* (a), seems to me to come very near the present case. There 100*l.* was hid in some hay in an old nail bag, and was sent by the coach. The proprietor had given a notice that he would not be answerable for money, unless he had notice what it was; the plaintiff knew of the notice, but did not apprise the proprietor that there was money in the bag. The jury found for the defendant; and on a rule nisi for a new trial, and cause shewn, the Court held the verdict right. Lord *Mansfield* said, “A common carrier, in respect of the premium he is to receive, runs the risk of goods, and must make good the loss, though it happen without any fault in him, the reward making him answerable for the safe delivery. His warranty and insurance is in respect of the reward he is to receive, and the reward ought to be proportionate to the risk. If he makes a greater warranty and insurance, he will take greater care, use more caution,

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and be at the expense of more guards or other methods of security; consequently, if the owner of the goods have been guilty of a fraud upon the carrier, such fraud will excuse the carrier. And here the owner was guilty of a fraud upon him: he meant to cheat him of his hire." Mr. Justice Yates said, "A common carrier insures goods, but he ought to be apprised what it is he undertakes, and then he will, or, at least, *may*, take proper care. But he ought not to be answerable where he is *deceived*. Here he was *deceived*." Mr. Justice Aston said, "It manifestly appeared that this was money sent under a concealment of its being money. The true principle of a carrier's being answerable is the reward; and a higher price ought, in conscience, to be paid him for the insurance of money, jewels, and valuable things, than for insuring common goods of small value:" and the rule was discharged. This case comes so near to the present, that I can hardly distinguish it. The plaintiffs here concealed; the defendants had not their due reward; the defendants were deprived of that which, according to this case, is the foundation of the carrier's liability, *viz.* a reward proportionable to the risk; and by not being apprised of what they received, they were not put upon their guard to take what, with reference to this article, would have been proper care. In *Clay v. Willan* (a), where the notice was that cash would not be accounted for, if lost, of more than 5*l.* value, unless entered, and one penny insurance paid for each pound value, and the plaintiff knowing of the notice, sent a parcel of light guineas, without stating what they were, the defendants were held not to be liable, even to the extent of 5*l.* The

(a) 1 *H. Black.* 298.

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reasons are not given, but it probably went upon the construction of the notice. *Izett v. Mountain* (a) is exactly to the same effect. In *Clarke v. Gray* (b), a notice "that no more than 5*l.* will be accounted for, for any goods or parcels, unless entered as such, and paid for accordingly," was held to leave the carrier liable only to the extent of 5*l.* in respect of goods of higher value. In *Harris v. Packwood* (c), *Lawrence J.* noticed at the trial, that there was good reason why a carrier should be made acquainted with the value of the goods, that he might take the greater precaution against fire, or greater force to resist felons; and on the rule nisi to enter a nonsuit, *Heath J.* observed, that in some carriages there are particularly safe places to deposit jewels and articles of superior value, when known to be such; and *Lawrence J.* said, there was nothing unreasonable in a carrier requiring a greater sum, where he carried goods of a greater value, for he is to be paid not only for his labour in carrying, but for the risk he runs, which is greater in proportion to the value; and the defendant having given a notice, which the plaintiff knew, the rule was made absolute for a nonsuit. *Bignold v. Waterhouse* (d), contains a similar doctrine; but there was another point, that the contract was with one of the defendants alone, and not with the firm, and, on that ground alone, Lord *Ellenborough's* opinion proceeded. These authorities induce me to think, that the defendants had a right to be apprised by the plaintiffs, that this box contained articles of value, and that the plaintiffs' neglect in this case, there being no misfeasance on the part of the defendants, is an answer to the action. The authorities

(a) 4 *East*, 371.(b) 6 *East*, 564.(c) 3 *Taunt.* 266.(d) 1 *M. & S.* 255.

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relied upon for the plaintiffs, are, as it seems to me, cases of misfeasance. *Ellis v. Turner* (a), was the case of wrongfully carrying the goods beyond the place at which they were to be delivered; they were to be delivered at *Stockwith*, between *Hull* and *Gainsborough*, and were carried beyond *Stockwith*. *Beck v. Evans* (b) is put by Lord *Ellenborough*, distinctly, as a case of *misfeasance*: there the carrier wrongfully drove on a cask of brandy, when he was told it was leaking. *Birkett v. Willan* (c) was a case of misfeasance also, for that was a wrongful delivery to a person who had no colour for receiving. In *Bodenham v. Bennett* (d) the defendant's bookkeeper knew at the time he received the parcel that it contained *Welch* notes, and yet he demanded no extra-payment: it did not appear that plaintiffs knew of the notice, and the Court thought that the parcel was carried beyond its destination, which would make it a case of misfeasance. In *Smith v. Horne* (e), the parcel was not of extraordinary value. The question of fair dealing, in not specifying the value, was never raised, and the defendants sent their goods for delivery in *London* by a cart, which had only one person to attend it, which might be deemed misfeasance, it being the general custom to send two persons with such carts. Upon the ground, therefore, that the defendants ought to have been apprised of the value of this box, and were not, that the plaintiffs were guilty of misconduct in this respect, that the plaintiffs' neglect deprived the defendants of the compensation they ought to have received, and prevented the defendants from taking the care which they otherwise would have done, and that the value of

(a) 8 T.R. 531.

(b) 16 East, 244.

(c) 2 B. & A. 356.

(d) 4 Price, 31.

(e) 2 B. Moore, 18.

the parcel increased the probability of loss, I am of opinion that the plaintiffs' neglect is, under the circumstances of this case, a bar to the action.

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ABBOTT C. J. I am of opinion that the case was properly left to the jury by my learned Brother at the trial, and I think the verdict of the jury warranted by the evidence. It is unnecessary for me to repeat the facts. The main objection to the Judge's direction is, that he desired the jury to consider whether there had been any thing like unfair dealing or want of proper caution on the part of the plaintiffs. It cannot be denied, that if the owner of goods deceive the carrier as to their quality and value, he shall not hold the carrier responsible. This is laid down in *Gibbon v. Paynton* (a), and the cases there cited. In that case money was sent hid in hay in an old nail-bag, by a person who did not disclose the contents of the bag, and was not asked to do so, and who knew the carrier had given notice that he would not be answerable for money, unless he should have notice that money was delivered to him. In the present case bank notes, in a box, are delivered to a carrier, without disclosing the contents of the box, the carrier having given notice that he will not be answerable for notes unless entered and paid for accordingly, and the plaintiff being acquainted with such notice. Thus far, therefore, the two cases appear to me to be very little different from each other. In the case of *Gibbon v. Paynton*, however, there was no proof of particular negligence on the part of the carrier; whereas, in the present case, it is contended, and probably rightly so, that there was

(a) 4 Burr. 2298.

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great negligence on the part of the carrier; the coach having been left standing for some space of time at midnight in the middle of a wide street, and no guard or watchmen within some yards of it, the box in question having been put into the boot. And it was contended, that for such gross negligence the carrier must answer, notwithstanding his notice, and the manner in which the box was delivered to him; and the case of *Bodenham v. Bennett*, was cited and relied upon. But in that case there was reasonable evidence that the driver knew the quality of the parcel; in the present case, I think such evidence is wanting. Now the degree of care that a man may be reasonably required to take of any thing, depends, in my opinion, upon the quality and value of the thing, and the temptation thereby afforded to theft. *Magno periculo custoditur quod multis placet.* And it cannot, I think, be denied, that a small box containing bank notes or money affords much greater temptation to theft than a parcel of equal size containing less valuable articles, or a larger and more bulky parcel of considerable value, a small box being a thing easily removed and concealed, and notes being things easily disposed of, and made profitable to a thief. If the carrier had known the contents of this box, he certainly *ought* to have placed it in a less exposed part of his carriage, or to have caused the carriage to be better watched; he ought to have done so; probably he would have done so: I cannot take upon myself to say that he would not. And I think an opportunity of doing so ought to have been given to him by some intimation of the contents of the box that he was required to convey. The negligence of the servants of common carriers has been for a long time a subject of frequent and just complaint, and it is the
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duty of Courts, as far as shall be consistent with justice and law in each particular case, to follow up the good old principle of the common law, and do every thing that may induce greater care and attention. But we must not, where a notice like the present has been given, require more care at their hands than may reasonably be required, adverting to all the particulars of the case before us. And I think we should do this, if we were to say that the jury might not have been reasonably desired to consider the conduct of the plaintiffs in this transaction, or that the conclusion which the jury have drawn in favour of the defendants was not reasonably warranted by the evidence before them. I am, therefore, of opinion that the rule ought to be discharged.

Rule discharged.

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HOLROYD *against* BREARE and HOLMES.

Monday,
November 6th.

PARKE had obtained a rule nisi, for referring it back to the Master, to review his taxation of costs in this cause. It was an action of trespass against the two defendants, who pleaded, first, the general issue, and; secondly, separate justifications. At the trial, a verdict was found for the defendant, *Breare*, generally, and against the defendant, *Holmes*, upon the general issue; but for him, upon his plea of justification. Three points were made, in the application for a rule nisi:

In trespass, two defendants appeared by the same attorney, and pleaded, 1st, general issue, and 2d, separate justifications. *A.* obtained a verdict generally, and *B.* obtained a verdict on his justification, but the plaintiff succeeded against him on the general

issue: Held, 1st, that *B.* was not entitled to any costs on the issue found for him; 2d, that the Master, in taxing *A.*'s costs, was right in allowing only one-half of the attorney's costs for appearance, &c.; 3d, that the costs due from the plaintiff to *A.* could not be set off against the costs due from *B.* to the plaintiff,

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First, that the Master had improperly allowed to *Breare* only half costs, in consequence of his having appeared by the same attorney, as *Holmes*. Secondly, that the Master had allowed the plaintiff full costs against *Holmes*, but had refused to allow to *Holmes* the costs on the issue found for him; and, thirdly, that the costs allowed to *Breare* ought to be set off against those to be paid by *Holmes*.

Tindal now shewed cause, and contended, as to the first objection, that in this case, the Master had followed the ordinary course, and that being a reasonable one, the Court would not, upon the present occasion, make any rule to alter it. As to the second point, he relied upon *Postan v. Stanway* (a), as expressly in point. As to the third point, if the set-off contended for were allowed, it would deprive the plaintiff's attorney of his lien; and he cited *Mordecai v. Nutting*. (b)

Parke, in support of his rule, stated, that he did not mean to press the first point, which was entirely a matter for the discretion of the Court. As to the second point, he admitted, that he could not distinguish the case from *Postan v. Stanway*. If, therefore, the Court felt themselves bound by that authority, the rule, upon this point, must be discharged. But in that case, the judgment of Lord *Ellenborough* proceeded entirely upon the practice of the Court. This, however, is not a matter of practice, but a right, depending on the true construction of the statute 23 *Hen. 8. c. 15. s. 1*. If, therefore, the Court see, that the construction hitherto

(a) 5 *East*, 261.(b) *Barnes*, 145.]

adopted

adopted in practice, be wrong, they will, notwithstanding the practice, give to the defendant that which is his right. The words of the statute are, "That if any verdict happen to pass, by lawful trial against the plaintiff, in any action, the defendant shall have judgment to recover his costs; and the statute of 4 *Jac. c. 3.*, which extended the statute of *Hen. 8.*, is to the same effect. Now here, there was a verdict upon the justification; and the defendant, therefore, is entitled to have judgment entered for him for those costs. It may, however, be said, that the statute only applies to cases where the plaintiff obtains no verdict, and that it would be inconsistent to have two judgments on the record. But *Day v. Hanks* (a) is an authority to the contrary of the first of these objections, and *Winnard v. Foster* (b) shews, that two judgments may be entered upon the record; and these authorities were not referred to and fully considered in *Postan v. Stanway*. As to the third point, the lien of the attorney applies only to cases where there are distinct actions, but not to a claim of set-off, where the whole arises in the same action; and he referred to *Schoole v. Noble and Others* (c), and *Cawthorn v. Thompson*. (d)

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 against
 BREARE.

BAYLEY J. The principal question in this case is, whether or not the Court now may give a judgment for costs to be paid by the plaintiff to the defendant, upon the issues found for him, as well as a judgment for the plaintiff for his damages and costs. Now that question, as it seems to me, was expressly determined in the case of *Postan v. Stanway*, where the defendant, having

(a) 3 *T. R.* 656.(b) 2 *Lutw.* 1190.(c) 1 *H. Bl.* 23.(d) *Hullock on Costs*, 471. 2d ed:

pleaded

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pleaded three pleas, two issues were found for the plaintiff; and on the third issue, which applied to a part only of the plaintiff's demand, a verdict was found for the defendant. It appeared, therefore, that the plaintiff had, upon the third issue, unnecessarily carried the defendant down to trial. The Court entered into the question, and decided, that the defendant was not entitled to have any judgment entered for him. That has been the course of proceeding in this Court, as far back as memory or precedent can go. No instance to the contrary has been cited, except *Winnard v. Foster*. That, however, was a case of replevin, where both parties are actors; and there the defendant, as it appeared, made an avowry, and claimed a return. Now, if the distress, as was the case there, were good only as to part, the plaintiff would be entitled to damages, and the defendant would be entitled to a return of the part for which the distress was good, and to damages consequent upon that return, so that there might be two different judgments properly entered upon the record. Upon this ground it seems to me, that that case is distinguishable from the present, and *Postan v. Stanway* being directly in point, we are not warranted in departing from the authority of that case. Upon the other point, I have no doubt that the Master has exercised a sound discretion; and as to the liberty of setting off the costs against each other, that cannot be allowed, because it would destroy the lien of the plaintiff's attorney. The rule must, therefore, be discharged.

BEST J. I am not disposed to disturb the practice which has prevailed as to the allowance of costs by the Master, where two parties appear by the same attorney. It

It seems to be a reasonable and proper rule. As to the second point, I think the case in *Lutwyche* is clearly distinguishable from the present, upon the ground pointed out by my Brother *Bayley*. But even if that were not the case, I should adhere to the authority of *Postan v. Stanway* in preference to it. Upon the third point, the cases cited are distinguishable upon this ground, that there the application was made on the part of the plaintiff, and upon an affidavit, in the first case, that the two defendants, who had suffered judgment to go by default, had acted under the authority of the other defendant, who had obtained the verdict, and that the latter had undertaken to pay their damages and costs. Here, however, the application is on the part of the defendant, and, if we were to grant it, we should disturb the lien to which the plaintiff's attorney is entitled. The rule, must, therefore, be discharged, and with costs.

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Rule discharged with costs. (a)

(a) *Abbott C. J.* and *Holroyd J.* were absent in the House of Lords.

In the Matter of the Executors of AITKIN,
deceased.

Wednesday,
November 8th.

SCARLETT had obtained a rule, calling upon Mr. *Blamire*, an attorney of this court, to shew cause why he should not deliver to the attornies of the exe-

Where the employment of an attorney is so connected with his professional character as to

afford a presumption that his employment was in consequence of that character, the Court will interfere in a summary way to compel him faithfully to execute the trust reposed in him; and therefore, where an attorney was employed by *A.* to collect and get in the effects due to him as administrator of another person, the Court compelled the attorney to render an account to the executors of *A.* of the monies, &c. received by him, although he had never been employed by *A.* or his executors to conduct any suit in law or equity on his or their behalf.

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In the Matter of
Aitkin.

cutors of *John Aitkin* his bill of costs, in relation to business done for the said *John Aitkin*, deceased, as administrator of *George Aitkin*, deceased; and also an account of his receipts and payments in respect of the estate of *George Aitkin*; and why he should not pay over the balance in his hands, and deliver up all deeds, papers, and writings in his custody or power belonging to the said executors. It appeared from the affidavits that Mr. *Blamire* had been employed by *John Aitkin* as his attorney and agent, to collect and get in the effects of *George Aitkin*, and that he had received considerable sums of money on that account: that repeated applications had been made by the executors of *John Aitkin* for this account, and for his bill of costs relating thereto; which had all been ineffectual. The affidavits in answer stated, that Mr. *Blamire* never was employed either by *John Aitkin* or by his executors in prosecuting or defending any cause or suit, or other proceeding in this court, or in any other court of law or equity.

Littledale shewed cause, and contended that this was an answer to the present application; and he cited *Cocks v. Harman* (a), where an application for a rule upon the defendant, to deliver up to the plaintiff an account similar to the present, was refused. And in *Ex parte Lowe* (b), a similar application was refused.

Scarlett, contra. If this rule be made absolute, it will be for the advantage of the attornies themselves, for it will prevent them from having it in their power to do that which is wrong, and the exercise of this summary

(a) 6 East, 404.

(b) 8 East, 237.

jurisdiction over them, as officers of the Court, will be equally for the advantage of the public; and he cited *Hughes v. Mayre* (a) and *Strong v. Howe* (b), where the Court compelled an attorney to deliver up deeds entrusted to him by his clients; and he contended that no distinction could be made between the delivering up of deeds and the payment of the money in dispute.

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In the Matter of
AIRKIN.

ABBOTT C. J. The question in this case is, whether this Court will compel an attorney to do that which in justice he ought to do. Now the rule by which the Court are to be governed in exercising this summary jurisdiction over its officers seems to me to be this; where an attorney is employed in a matter wholly unconnected with his professional character, the Court will not interfere in a summary way to compel him to execute faithfully the trust reposed in him. But where the employment is so connected with his professional character as to afford a presumption that his character formed the ground of his employment by the client, there the Court will exercise this jurisdiction. And the case where the Court compelled the attorney to deliver over deeds, placed in his hands for the purpose of making a conveyance, proceeds upon this ground. For inasmuch as a conveyance requires knowledge of law, the trust is reposed by the client in the party, in respect of his being an attorney. I am of opinion that the facts in this case bring it within this rule, and that the rule ought to be made absolute.

Rule absolute.

(a) 3 T. R. 275.

(b) 1 Stran. 621.

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Thursday,
November 9th.

CRAWSHAY and Others *against* HOMFRAY and Others.

The wharfage, &c. due upon goods imported was, by the course of trade, paid by the importer at the *Christmas* following the importation, whether the goods were in the mean time removed or not. The goods were sold to *A.*, and, after *Christmas*, the merchant importer became bankrupt: Held, that there was no lien on the goods for the wharfage, &c. as against *A.*

TROVER for iron. Plea, general issue. At the trial at the last sittings at *Guildhall*, before *Abbott C. J.*, it appeared that the iron in question had been imported by Messrs. *Tottie* and Co., and landed at Defendants' wharf on the 14th *October*. On the 15th *October* the plaintiffs purchased the same of *Tottie* and Co., and the order for delivery of it was given, and the price paid to *Tottie* and Co. by the plaintiffs on the following day. A part of the iron was subsequently delivered to the plaintiffs at different times, till *March* following, when, in consequence of *Tottie* and Co. having become bankrupts, the remainder of the iron, amounting to about 90 tons, was detained by the defendants, who claimed a lien upon it for their charges in respect of wharfage, &c. These charges amounted to about 126*l.*, and the course of dealing proved as to them was that they were usually paid by the merchant importer at the *Christmas* following the importation, whether the iron had been removed in the mean time or not. Upon the trial, the Lord Chief Justice was of opinion that the defendants were not entitled to a lien upon the iron for these charges; and the jury, under his direction, found a verdict for the plaintiffs. And now

Marryat moved for a rule nisi to set aside this verdict, and to enter a nonsuit. If in this case the usual time for payment of the charges upon the iron had not arrived, the case would be very different. Here, however, it

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it had expired, and the money was demandable at the time when the lien was claimed, and this brings the case within the authority of *Stevenson v. Blakelock* (a), in which this very distinction was taken, between that case and *Cowell v. Simpson*. (b) It was, indeed, formerly laid down, in *Bremin v. Currant* (c), that wherever there was a special agreement, there could be no lien; but that must now be taken subject to the observations made by Gibbs C. J. in *Hutton v. Bragg* (d), where he cites 2 Roll. Ab. 52. M. pl. 2. 6., and Cro. Car. 271., and Yelv. 66.; and there that learned Judge expressly guards against the being understood as saying that the lien which had been taken away by an agreement to pay in bills would not be restored after those bills had been dishonoured. And in *Chase v. Westmore* (e) this Court held, that an agreement to pay a miller in a particular manner did not deprive him of his right of lien. Here, perhaps, in the interval between *October* and *Christmas* the defendant's right of lien was suspended; but upon the failure of *Tottie* and Co. to pay at that time, the right of lien was restored.

ABBOTT C. J. I think we ought not to grant any rule in this case. It is distinguishable from the authorities which have been cited. Here it is clear that, at the time when this iron was originally purchased by the plaintiffs, these defendants had no lien upon it for these charges. Now can it be contended that after this a lien upon these goods, the property of the plaintiffs, is to arise from a subsequent default in payment by other

(a) 1 M. & S. 535.

(b) 16 Ves. jun. 275.

(c) Bull. N. P. 45.

(d) 2 Marsh. 345.

(e) Selw. N. P. 1322.

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persons. I think it cannot; and, therefore, retain my opinion at the trial, that the plaintiffs are entitled to recover.

BAYLEY J. According to the usage of trade, it appears that in this case a specific time is given to the merchant importer for the payment of these dues. The iron in question, which originally belonged to *Tottie and Co.*, was by them sold to the plaintiffs in *October*, and at that time the plaintiffs had clearly a right to the delivery, without any lien being claimed by the defendants. In consequence of this, on their application, a great part of it is delivered. How, then, can the non-delivery of the remainder, till after the debt due from *Tottie and Co.* has become payable, make any difference? As it is clear that at the time of the sale the defendants had no lien, I am of opinion that the subsequent non-delivery did not give any new right of lien to them.

HOLROYD J. The principle laid down in *Chase v. Westmore*, where all the cases came under the consideration of the Court, was this, that a special agreement did not of itself destroy the right to retain; but that it did so only where it contained some term inconsistent with that right. Now if by such agreement the party is entitled to have the goods immediately, and the payment in respect of them is to take place at a future time, that is inconsistent with the right to retain the goods till payment. That was the case here: the wharfage was not payable till *Christmas*, and by the sale the plaintiffs had a right to an immediate delivery of the goods. And the subsequent default of *Tottie and Co.*

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to pay the debt due from them will not alter the case. I think, therefore, that the defendants had in this case no right to retain, and that this verdict is right.

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BEST J. The principle has been truly stated, that unless the special agreement be inconsistent with the right of lien, it will not destroy it. Here, however, it seems to me that it was inconsistent, the wharfage not being, by the usage of the trade, payable till a subsequent period, and the goods being to be delivered immediately. There was, therefore, in this case no original right of lien in respect of these charges; and I am not aware of any case where it has been decided that a subsequent default in payment can give such a right where it did not originally exist.

Rule refused.

DOE, on the Demise of SUTTON, *against*
RIDGWAY.

Friday,
November 10th.

EJECTMENT to recover lands in the county of *Somerset*. Plea, general issue. At the trial, before *Burrough J.*, at the last *Summer* assizes for that county, the lessor of the plaintiff, who claimed, as heir at law of *Anne Walker*, the person last seized, in order to deduce the pedigree, offered in evidence the dying declarations of one *Barrett*, who had as she herself stated, been servant to *Margaret Walker*, through whom the pedigree was traced. This person had, during her last illness, at the age of 103, after she had expressed her full conviction that she could not recover, and only a few days before

In the proof of a pedigree, the dying declarations of *A.*, as to the relationship of the lessor of the plaintiff to the person last seized, are not receivable in evidence.

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her death, made these declarations. The learned Judge rejected the evidence; and the defendant having obtained a verdict,

Scarlett moved for a new trial. These declarations ought to have been received in evidence. The principle on which such evidence is receivable is stated to be founded partly on the situation of the dying person, which is considered as powerful over his conscience as the obligation of an oath, and partly on the absence of interest at such a time, which dispenses with the necessity of a cross examination (a); and this equally applies to civil as to criminal cases. This will be found laid down in the case of the subscribing witness to a bond, whose dying declarations were allowed to be given in evidence, by *Heath J.* (b), to prove it a forgery, and in *Wright, dem. Clymer, v. Littler.* (c) And in *Drummond's* case (d), it seems to have been admitted, that the dying declarations of a person, as to his having stolen a watch, would be admissible, although there the evidence was rejected, on the ground that the party making the declarations was an attainted convict. Here the party was in articulo mortis, and could have no motive for deceit. The declarations ought, therefore, to have been received. He also referred to *Tinkler's* case. (e)

ABBOTT C. J. The cases cited are, I believe, the only exceptions to the general rule of not receiving evidence,

(a) *Phillipps on Evidence*, 100. 1st edit.

(b) Cited by Lord *Ellenborough* in *Avison v. Kinnaird*, 6 *East*, 195.

(c) 3 *Burr.* 1244.

(d) 1 *Leach. Cro. Cas.* 378.

(e) 1 *East. Pl. Cr.* 354.

unless

unless upon oath, and with the opportunity for cross examination. I am not aware of any other; and it seems to me, that the present case does not fall within these exceptions. The evidence, therefore, was properly rejected by the learned Judge.

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BAYLEY J. In the case of *Avison v. Kinnaird*, the declarations were received upon a very different principle. There they were part of the *res gestæ*; and, in *Tinkler's* case, the declarations received were those of the party who had taken the poison. The case of the subscribing witness seems to be founded on this; he must have been called as a witness, if he had been alive, and it would then have been competent to prove, by cross examination, his declarations as to the forgery of the bond. Now the party ought not, by the death of the witness, to be deprived of obtaining the advantage of such evidence. This case, however, is very different.

HOLROYD and BEST Js. concurred.

A rule nisi was afterwards granted on other grounds.

The KING *against* INMAN.

Saturday,
November 11th.

QUO warranto against the defendant, for exercising the franchise of a free burgess of the borough of *Colchester*, in the county of *Essex*. The custom stated in the defendant's plea was, that every person who has

An apprentice, bound for seven years to A., served him in his house between five and six years, and afterwards, for

the remainder of the term, resided in his mother's house, having agreed with his master that he should be at liberty to work for whom he pleased, he paying 2s. per week to his master. The master also, during this time, occasionally gave him work, for which he was not paid; Held, that this was not a continuance of the service to A. for seven years under the indenture.

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The King
against
IMMAN.

served an apprenticeship by indenture, to a free burgess of the said borough, for the term of seven years, according to the custom of the said borough, in any art, trade, mystery, or manual occupation, hath used and of right hath been, and of right ought to be admitted and sworn into the office of a free burgess of the said borough; and the plea further stated, that the defendant had served an apprenticeship, for seven years, according to this custom, to one *George Johnstone*, in the art, trade, and mystery of a cordwainer. At the trial, before *Wood B.*, at the last assizes for the county of *Essex*, it appeared, that the defendant had been bound apprentice for seven years, to *Johnstone*, a freeman of *Colchester*. He served him between five and six years, under the indenture, during which time he lived in his master's house. At the expiration of this time, his master's business having diminished, he quitted his house, and went away to reside in that of his mother; during which time, his master permitted him to work for any other persons whom he might choose, he having agreed to pay to his master two shillings a week. His master occasionally gave him work to do, for which he was not paid, and, during all this time, the indenture remained in the master's possession. The jury having found a verdict for the crown,

Lawes Serjt. moved for a rule nisi, to set it aside. In this case, the apprentice paid 2s. a week, during the whole period when he was absent, and that makes it, in point of law, continue to be a service to the first master, under the indenture, *Rex v. Offerton (a)*; and here, also, the indentures were never given up.

(a) *Burr. S. C.* 802.

ABBOTT C. J. It is quite clear, that in order to entitle this party to his freedom, there must be not only a continuance of the binding, but also a continuance of the service under the indentures, to a free burgess, during the whole period of seven years. I am of opinion, that the service under the indentures, to the first master, did not continue so long; and the consequence is, that the party is not entitled to his freedom. The verdict, therefore, was right.

Rule refused.

DOE, on the Demise of SIMON WESTLAKE,
against SIMON WESTLAKE.

Monday,
November 13th.

EJECTMENT for a moiety of certain premises in the county of *Devon*. Plea, not guilty. At the trial before *Graham B.* at the last assizes for the county of *Devon*, the plaintiff claimed under the will of his uncle *Simon Westlake*, of *Erbourne*, in the county of *Devon*, by which, among other things, he bequeathed unto his brother, *Thomas Westlake*, 20*l.*; to *Elizabeth Luxton*, his brother *Richard's* daughter, 10*l.* and the use of a house during her life; and he then gave and bequeathed unto *Mary*, the wife of *Matthew Westlake*, his brother, the yearly sum of 5*l.* to be paid her by her husband out of his moiety of the tenement called *Stone*: then followed the devise upon which the question turned, "I give, devise, and bequeath unto *Matthew Westlake*, my brother, and to *Simon Westlake*, my brother's son, all that my fee-simple messuage or tenement called *Stone*, situate in *Erbourne*, in the county of *Devon*, which said premises I give and devise to each of them, jointly and severally

A testator, by his will, devised to *Matthew W.*, his brother, and *Simon W.*, his brother's son, a certain estate. It appeared that the testator had three brothers, each of whom had a son of the name of *Simon*, living at the time of the testator's death: Held, that the proof of this fact did not raise any latent ambiguity in the will, so as to let in parol evidence of declarations of the testator, as to the person intended; it being clear, that the person entitled was *Simon*, son of *Matthew*.

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severally alike, and to each of their heirs and assigns for ever, subject to the payment of the annuity to my wife, before mentioned, as well as to the payment of the legacies given by the will; and I charge my real estate with the payment of such legacies. I likewise give and bequeath unto *Matthew Westlake*, my brother, and to *Simon Westlake*, jointly and severally alike, all other my messuages, tenements, lands, goods, and chattels, and testamentary estates whatsoever, and I appoint them executors of my will." It appeared in evidence that the testator had three brothers *Thomas*, *Richard*, and *Matthew*, each of whom had a son of the name of *Simon*, living at the time of the testator's death. The defendant's counsel contended that that established a latent ambiguity in the will, and they tendered evidence of declarations of the testator to shew that he had intended to bequeath his property to the defendant, *Simon Westlake*, who was the son of *Richard Westlake*. The learned Judge received the evidence. The jury, however, found a verdict for the plaintiff. And now

Moore moved for a new trial, on the ground that this verdict was against the evidence; but

ABBOTT C. J. It is unnecessary to consider whether this verdict was against the evidence; for I am very clearly of opinion that the declarations of the testator ought not to have been received in evidence at all. It is perfectly true, that a latent ambiguity may be raised by the proof of some fact not to be collected from the will itself; but then the fact must be such as, when proved, will raise an ambiguity in the will. Now the fact of the three brothers of the testator having each a

son

son of the name of *Simon* does not raise any ambiguity upon this will. The devise upon which the question turns forms a distinct independent sentence, and is in these words: "I give, devise, and bequeath unto *Matthew Westlake*, my brother, and unto *Simon Westlake*, my brother's son." Now it seems to me that, in point of legal construction, when the testator is speaking of his brother's son, he must be taken to speak of the son of that brother who was then particularly in his mind. *Matthew Westlake* was the brother then in the mind of the testator; and, consequently, *Simon Westlake*, his son, must be the person intended. Admitting it, therefore, to be the fact that the testator had three brothers, each of whom had a son of the name of *Simon*, I cannot entertain the least doubt that he intended by this devise to give the property to *Simon* the son of *Matthew Westlake*. If that be so, there was no ambiguity in the will; and, therefore, the evidence ought not to have been received. I am, therefore, of opinion that there is no ground for a new trial.

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against
WESTLAKE.

Rule refused.

AUBIN *against* DALY.

Friday,
November 17th.

BY letters patent, under the great seal of *England*, dated *July 19. 24 Car. 2.*, as well in consideration of the surrender by the Earl of *Kinnoul*, into the hands of *the king*, an annuity of 1000*l.*, to be paid out of his revenue of four and a half per cent. at *Barbadoes* and the *Leeward* islands: Held, that this annuity was personal property, and duly passed under a will attested by two witnesses, by a residuary clause bequeathing all the rest, residue, and remainder of a testatrix's personal estate, of what nature or kind soever, to her executors.

By letters patent, 24 *Car. 2.*, the king granted to the use of *A.*, his heirs and assigns for

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 against
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the crown, of the *Caribbee* islands, and certain other islands, and possession therein referred to, and all his estate, claim, and demand in or to the same, as also for divers other good causes and considerations, his majesty did, for himself, his heirs and successors, give and grant unto the said earl one annuity of 600*l.* of lawful money of *England*, to hold, enjoy, and receive the same, to him the said earl, his executors, administrators, and assigns, for the term of five years, from the feast of *Saint Michael* the Archangel, then last past. And the king also granted unto the Earl of *Kinnoul* and his heirs, one other annuity of 1000*l.*, of lawful money of *England*, to him the said earl, his heirs and assigns; to the only proper use and behoof of the said earl, his heirs and assigns for ever, from and immediately after the end and expiration of the said term of five years, without any account or other matter or thing to be rendered or given for the same; which said respective annuities the king appointed should from time to time be duly paid to the earl, his heirs, executors, administrators, and assigns, at the four most usual feasts and terms in the year, out of his majesty's revenue of 4½ per cent., at *Barbadoes* and the *Leeward* islands, as the same should come into the receipt of his majesty's exchequer, or by levying tallies of assessments upon the farmers or collectors of the said revenue for the time being, notwithstanding any debt or debts charged or chargeable upon the said revenue, or any part thereof, the first payment to commence from the feast day of *Saint Michael* the Archangel; and if it should happen that the said revenue of 4½ per cent. should at any time or times after the expiration of five years fall short of the said annuities, then the king

granted

granted that the same should be fully made up to the said earl, his executors, administrators, and assigns, out of any other treasure of his majesty, his heirs and successors, at any time being or remaining in the receipt of his exchequer; and his said majesty did thereby authorise the commissioners of his treasury, &c., to give warrant for the levying tallies of assessment from time to time upon the farmers or collectors of the said revenue of $4\frac{1}{2}$ per cent. at *Barbadoes* and *Leeward* islands aforesaid, for the time being, for the due payment of the said annuity of 1000*l.* to the said earl, his heirs, executors, administrators, and assigns respectively as aforesaid; and did declare, that the receipt of the said earl, his heirs, executors, administrators, and assigns respectively, unto the said farmers and collectors, should be sufficient discharge. By virtue of various subsequent conveyances and assurances, and, ultimately, by virtue of a certain indenture, bearing date the 26th day of *May*, 1773, the annuity of 1000*l.* was granted, bargained, and sold unto *William Stafford*, to hold the same unto and to the use of him, his heirs, executors, administrators, and assigns respectively, for ever, subject, nevertheless, to a proviso in the said indenture contained, whereby it was declared, that if the grantors, or such persons who for the time being should be entitled to the freehold or inheritance, or other beneficial interest of and in the same annuity, or any part thereof, or any or either of them, should pay or cause to be paid unto the said *William Stafford*, his heirs, executors, administrators, and assigns, the principal sum of 12,381*l.* 14*s.* 10*d.*, with interest, at the rate of $4\frac{1}{2}$ per cent., at certain times in the same indenture mentioned, and long since past, he the said *William Stafford*, his heirs or assigns, would, at their request

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request and at their charges, re-grant the said annuity, and all arrears thereof, unto and to their use, or unto such person or persons as they should appoint in that behalf, freed and discharged from all mesne incumbrances. The said principal money was not paid to Mr. *Stafford* in his life-time, and still remains due upon the said mortgage. The exchequer annuity, subject to the usual deductions, was regularly received, up to *January 5th, 1818*. *William Stafford*, by his will duly attested, bearing date *22d October, 1777*, gave all his real and personal estate whatsoever unto his wife, *Alethea Maria Stafford*, her heirs, executors, administrators, and assigns, and appointed her sole executrix thereof, and died in the year *1796*, without issue. The said will was duly proved by his executrix on the *7th September, 1796*. *Alethea Maria Stafford*, by her will, bearing date the *12th March, 1810*, and attested by two witnesses, after directing that all her just debts, funeral and testamentary expences, and the charges of proving her said will, should be in the first place paid; and after giving sundry pecuniary and specific legacies, and divers annuities to several persons, and several charitable institutions therein mentioned, bequeathed as follows; viz. “And all the rest, residue, and remainder of my personal estate, of what nature or kind soever, I give and bequeath the same, and every part thereof, unto *John Aubin* and *Patrick Lewis*, their executors, administrators, and assigns, upon trust, as soon as conveniently may be after my decease, to get in and convert into money all such parts of my estate as shall not consist of money, or of perpetual stocks or funds.” And then, out of such monies, &c., to pay the several pecuniary legacies, and to provide sufficient funds for the payment of the several annuities and other
yearly

yearly payments, directed by her will to be made, and to set apart the annual sum of 200*l.*, to be paid for ever to the treasurer for the time being of the *Thatched House Society*, for the sole uses of that institution. And after directing similar appropriations for the benefit of other charities, she bequeathed all the residue of her said personal estate and effects to be divided equally between and for the benefit of three charities therein named, to be paid in equal proportions, for the benefit of the same respectively. And she appointed the said *John Aubin* and *Patrick Lewis* her executors. The testatrix died on the 29th *September*, 1810, and the said *John Aubin* and *Patrick Lewis* duly proved the said will. The exchequer annuity, under an order of the Court of Chancery, made 17th *February*, 1817, in a cause of *Aubin v. Daly*, was sold to *John Dearman Church, Esq.*, for the sum of 12,050*l.* The question for the opinion of this Court was, whether the legal estate and interest in the said exchequer annuity of 1000*l.* passed, by the will of *Alethea Maria Stafford*, to *John Aubin* and *Patrick Lewis*, the executors named in the will.

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 against
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Denman, for the plaintiff. The question in this case is, whether this annuity duly passed by a will attested only by two witnesses. That depends on another question, whether this be personal or real property. In *Co. Lit. 20. a.* it is thus laid down: "And so it is if I, by my deed, for me and my heirs, grant an annuity to a man and the heirs of his body; for that this *only chargeth my person*, and concerneth no land, nor savoureth of the realtie." *Holderness v. Carmarthen*,

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then (a), *Buckeridge v. Ingram* (b), and *Earl of Stafford v. Buckley* (c), are authorities to the same effect; and in the last case, which is upon the very will now in dispute, Lord *Hardwicke* decided this point on the authority cited from *Co. Litt.*

Richmond, contra. It is not necessary here to deny the principles of law laid down by the other side. For, admitting that this will is sufficiently executed, still there is an ulterior question, viz. whether this annuity passes by the will. It must pass by one of two modes. Either it vests in the executors *virtute officii*, or by the residuary bequest to them. An annuity of this sort is thus defined by Lord *Coke* (d): “And so it is if an annuitie be granted to a man and his heirs, it is a fee-simple personal.” As such it will be descendible to his heirs. It was formerly doubted whether an annuity was assignable; but that doubt did not extend to annuities of inheritance. *Gerard v. Boden* (e), *Baker v. Broke*. (f) And in *Brooke’s Abr.* tit. *Annuities*, pl. 39., it is thus laid down: “It was doubted if he who has an annuitie in fee may grant it over, for it is a chose in action; yet per alios it is an inheritance; and, therefore, it may well be granted over, and that without attornment, for it charges the person; and yet the defendant was charged as parson of a church. And a debt cannot descend to the heir, but an annuity of inheritance may descend to the heir; therefore it is not merely personalty.” And in *Fitzh. Ab.* tit. *Release*, pl. 48., “Release of all actions personal is a good bar in a writ of annuity, notwith-

(a) 1 Bro. Ch. Ca. 377.

(b) 2 Ves. jun. 652.

(c) 2 Ves. 170.

(d) Co. Litt. 2a.

(e) Hetley, 80.

(f) Moore, 5.

standing

standing he claim to him and his heirs ; and a release of actions real is also good, because it is mixt." And in *Holderness v. Carmarthen* (a), an annuity granted by the letters patent of King *William* and Queen *Mary* was considered on the same footing as an annuity of inheritance, and assignable. And the point was also discussed in *Priddy v. Rose* (b). In *Nevil's* case (c), an annuity of inheritance was held forfeitable for treason by 26 H. 8. c. 13. And in *The Earl of Stafford v. Buckley*, Lord *Hardwicke* expressly says of this annuity, " All the rest of the personal estate that could pass to executors would go to them ; but this is a kind of personalty which, according to Doctor and Student, would not be assets in executors, and, consequently, will not go to them by being named executors." These authorities, therefore, shew that the executors did not take this annuity *virtute officii*. Then are the words in the bequest sufficient to give it to them ? The testatrix bequeaths all the rest, residue, and remainder of her personal estate, of what nature or kind soever, and every part thereof, unto *J. A.* and *P. L.*, their executors, administrators, and assigns, upon certain trusts. Now, it is clear, by reference to Lord *Hardwicke's* judgment, that he entertained considerable doubts whether this annuity would pass by a sweeping bequest of this nature. Suppose a will bequeathed all the testator's hereditaments to *A.*, and all his personal estate to *B.*. It seems clear that *A.* would take such an annuity as this, and the heir at law is not to be disinherited without express words, and that though general words are used. *Doe, dem. Spearing, v. Buckner.* (d) [*Bayley J.* There

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(a) 1 Bro. Ch. Ca. 376.

(b) 3 Meriv. 86.

(c) 7 Rep. 124. b.

(d) 6 T. R. 610.

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the devise was followed by words shewing that the testator had only his personal estate in contemplation. The words of the trust in that case were very material, for the trustees were to add the interest to the principal, which shewed that there the testator was only speaking of his personal estate.] Where the residuary clause is in favour of executors, it was held, *Shaw v. Bull* (a), that no more would pass by it than would go to executors *virtute officii*; and that is the case here. And the words “of what nature or kind soever” apply only to real and personal chattels, and do not extend to hereditaments. So, in *Rose v. Bartlett* (b), a devise of all lands and tenements was held not to include terms for years. The Court, therefore, are not bound by the literal sense of general words. He also cited *Ex parte Sergison* (c), *Ex parte Morgan* (d), and *Silberschildt v. Schiott* (e). [Bayley J. The argument would go the length of saying that property of this description could only pass by a special devise.]

Denman, in reply, contended, that it was clear that this annuity passed by the residuary clause in Mrs. *Stafford*’s will. Here there is nothing to restrain the general words of the devise. And the only question is, whether this is personal estate; whether it would pass to the executors *virtute officii* is a very different question from the present. This is the case of a specific bequest of the residue, and is quite sufficient to pass the annuity in question.

Cur. adv. vult.

(a) 12 *Mod.* 593.

(b) *Cro. Car.* 292.

(c) 4 *Ves.* 147.

(d) 10 *Ves.* 103.

(e) 3 *Ves. & B.* 45.

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The following certificate was afterwards sent :

1820.

This case has been argued before us by counsel, and we are of opinion, that the legal estate and interest in the exchequer annuity of 1000*l.* passed by the will of *Alethea Maria Stafford* to *John Aubin* and *Patrick Lewis*, deceased.

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AUMN
against
DALY.

C. ABBOTT.

J. BAYLEY.

G. S. HOLROYD.

W. D. BEST.

Ex parte DOUTHAT.

Friday,
November 17th.

THE following case was sent by the Lord Chancellor for the opinion of this Court.

On the 30th March, 1819, *Stephens Douthat*, late of *Liverpool*, merchant, absconded from *Liverpool*, being very considerably indebted to creditors who had trusted him in the ways of his trade ; and on the 8th April, 1819, a commission of bankrupt under the Great Seal of *Great Britain*, bearing date that day, was awarded and issued against the said *Stephens Douthat* on the petition of *William Wade*, of *Liverpool*, aforesaid, merchant, the holder of a bill of exchange, dated the 7th March, 1819, drawn by the said *Stephens Douthat* on *Eyes and Miller*, and accepted by them, for 148*l.* 7*s.* 2*d.* payable to the order of the said *William Wade* four months after date, which bill of exchange was given by the said *Stephens Douthat* in payment of the sum of 148*l.* 7*s.* 2*d.* due from the said *Stephens Douthat* to the said *William Wade*, being the balance of an account current adjusted between them,

Where *A.* having drawn a bill of exchange for 148*l.* in favour of *B.*, to whom he was previously indebted in that amount, committed an act of bankruptcy before either the bill was due or had been presented for acceptance :

Held, that such bill of exchange was a good petitioning creditors' debt, although it appeared that subsequently to the commission, the bill had been duly presented and paid by the acceptors.

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and which debt, or such balance of account, was due in cash before the bill was drawn. Before the bill became due the said *William Wade* proved the said bill as a debt under the said commission. The said *Eyes* and *Miller* are merchants in *Liverpool* aforesaid, and were in good credit at the time of the issuing of the said commission, and the said bill of exchange, when at maturity, was duly paid by them.

The question for the opinion of this Court was, whether, under the circumstances aforesaid, there was, at the date and suing forth of the said commission, a good petitioning creditor's debt to support the same.

Littledale, in support of the petitioning creditor's debt. This question depends on the construction of two statutes, 7 G. 1. c. 31. and 5 G. 2. c. 30. s. 22. By the first section of the former act persons having bills, &c. given by bankrupts, but payable at a future day, are admitted to prove them under the commission in like manner as if they were made payable presently; but by the third section such persons are prohibited from being petitioning creditors. By the second act, however, this latter provision is repealed, and the question, therefore, is, whether this would fall within the first section of 7 G. 1. c. 31., and be a debt proveable under the commission. Now, as to that, there are several cases in point; in *M'Carty v. Barrow* (a), the defendant drew bills on *Spain*, and afterward became bankrupt, and subsequently to this the bills were returned unaccepted, and protested; and the Court discharged him out of custody on the ground, that it was a debt proveable under the com-

(a) *Str.* 949. 3 *Wils.* 16. and 7 *East*, 437. *S. C.*

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mission. And Lord C. J. *Wilmot* said, in observing on this case in the case of *Chilton v. Whiffin* (a), that the statute 7 G. 1. c. 31. extended to the case, and *Starey v. Barns* (b) is to the same effect. In *Brett v. Levett* (c) the Court held, that bills of exchange, to the amount of 100*l.* drawn before the act of bankruptcy, but due afterwards, were sufficient, when due, to found a petition for a commission. It is true, that in these cases the bills had been dishonoured; but that can make no difference in the judgment, for the dishonour had not taken place at the time of the act of bankruptcy, and the subsequent dishonour would not therefore vary the case; for it must have been a debt due at the time of the act of bankruptcy, and that it could only be by force of the statutes, *Ex parte Charles* (d): nor can the subsequent payment of the bill alter the situation of the parties; for if that were to be the law, the commissioners, and all persons acting under their authority, would become trespassers ab initio by an ex post facto payment by a third person, although, at the time when they acted, it could not be ascertained whether such payment would ever be made. This would be in effect to repeal the act which enables holders of such securities to become petitioning creditors; for no person would ever venture to act upon it. In this case, too, there is an additional circumstance that the bill of exchange was given for an antecedent debt, which relieves the case from some of the difficulties suggested in the other cases. The case relied on by the other side, of *Rose v. Rowcroft* (e), can hardly be considered as an authority; all that appears there, is, that

(a) 3 *Wilson*, 17.(b) 7 *East*, 437.(c) 13 *East*, 213.(d) 14 *East*, 197.(e) 4 *Campb.* 245.

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Gibbs C. J. did not like to decide the point ; inasmuch as it was not necessary so to do, it can hardly be considered as shewing that he entertained any serious doubts upon the question.

Parke, contra. The words of the 7 G. 1. c. 31. s. 1. are very material, it states that all and every person or persons who have given credit or shall hereafter give credit on such securities, &c. shall be admitted to prove them as if payable presently, and not at a future day. What, therefore, is done, is simply this ; where the bankrupt is liable, the statute accelerates the time of payment ; but it does not alter, in any respect, the law, as to his liability. Now, the drawer of a bill of exchange is not liable until after the bill has been presented and default made by the acceptor, and that default duly communicated to the drawer. When these formalities have been complied with, and the bill has been dishonoured, then, undoubtedly, the credit is given on the security to the bankrupt, and the statute applies. The construction contended for by the other side, would lead to this consequence that a commission of bankruptcy might be sued out against a perfectly solvent person, and that by a petitioning creditor, who had received no injury whatever. [*Abbott* C. J. That cannot be, unless the party has, by committing an act of bankruptcy, subjected himself to this inconvenience. That, at least, is an act dependent on himself.] In the present case, it appears that the petitioning creditor has sustained no damage, for the acceptors duly paid the bill when presented to them. All the statutes of bankruptcy speak of the petitioning creditor as a party injured. The 35 Hen. 8. c. 9., speaking of the petition, describes it as " a complaint in writing by any parties grieved concern-
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ing the premises." The 13 *Eliz. c. 7.* and 1 *Jac. 1. c. 15.* are to the same effect. And in *Ex parte Dewdney and Seaman (a)*, Lord *Eldon*, in discussing this question, says that this species of execution, (*viz.* by a commission of bankrupt), was intended by the legislature to be given to those creditors, who, if a commission had not issued, could, by legal or equitable remedies, have compelled payment. Now, that seems to be the test to be applied here. Until the bill has been dishonoured, the holder cannot compel payment against the drawer. In all the cases cited on the other side, the bill has been dishonoured before the proof under the commission. [*Bayley J.* The dishonour was subsequent to the issuing the commission, and a party can only prove for debts then due. The cases, therefore, shew, that proof has been allowed in cases where the bills had not been dishonoured. *Abbott C. J.* The word "debt" is not to be found in the 7 *G. 1. c. 31.* The party is to be allowed to prove his bill-bond note or other security. And no distinction can now be taken, between a proveable debt, and that of the petitioning creditor. *Bayley J.* The words of the statute are, "all persons who shall give credit," &c. Now a man who takes a bill from the drawer is surely a person giving credit to him; and the provision as to the rebate of interest, is also strong to shew that the legislature contemplated a possible proof under the commission, and a payment of a dividend, too, before the bill should become due.] As to the rebate of interest, spoken of in the statute, these words will be satisfied by applying them to cases where the bankrupt is acceptor of a bill, between whose situation and that of the drawer there is a material difference.

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(a) 15 *Ves.* 496.

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Littledale, in reply. The words, as to the rebate of interest, are perfectly general, and there is nothing whatever to shew that they are to be restrained to the case of the bankrupt being the acceptor of a bill. And the judgment of Lord *Ellenborough*, in *Starey v. Barns*, where he dissects the statute 7 G. 1. c. 31., is decisive of the present case.

The following certificate was afterwards sent :

This case has been argued before us by counsel, and we are of opinion that there was, at the date and suing forth of the said commission aforesaid, a good petitioning creditor's debt to support the same.

C. ABBOTT.

J. BAYLEY.

G. S. HOLROYD.

W. D. BEST.

Friday,
November 17th.

HAMMOND *against* REID.

Policy of insurance from *Para* to *New York*, with leave to call at any of the *Windward* and *Leeward* islands on the passage, and to discharge, exchange, and take on board the whole or any part of any cargo at any

ACTION on a policy of insurance on the ship *Ara-bella*, on a voyage at and from *Para* to *New York*, during her stay there, and at and from thence to *Para*, with leave to call at all or any of the *Windward* and *Leeward* islands and colonies on her passage to *New York*, with leave to discharge, exchange, and take on board the whole or any part of any cargo or cargoes at any ports or places she might call at or proceed to, particularly

ports or places, particularly at all or any of the *Windward* and *Leeward* islands, without being deemed any deviation : Held, on this policy, the ship having proceeded to two of the *Leeward* islands for a purpose wholly unconnected with the voyage, that it was a deviation, and vitiated the insurance.

at

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at all or any of the *Windward* and *Leeward* islands, without being deemed any deviation from and without prejudice to the insurance. The declaration stated the sailing of the vessel on the voyage insured, and a loss by perils of the seas. Plea general issue. At the trial, at the *Lancaster* Summer assizes, 1819, before *Bayley J.* a verdict was found for the plaintiff, subject to the opinion of the Court on a case, which stated, that the ship sailed from *Para* on the voyage insured with a cargo on board, bound for *New York*; but with orders from the plaintiff, her owner, to proceed in the first instance to *Barbadoes*, where the captain was directed to sell the cargo and receive other goods on board in exchange for it, and proceed from thence to *New York*, after calling at the islands of *St. Bartholomew* and *St. Thomas*, two of the *Leeward* islands, for the purposes after stated. When the vessel sailed from *Para* the plaintiff was there, and intended to proceed from thence in another vessel direct to *New York*, where he expected to meet a vessel, also belonging to himself, called the *Alice*, from *Liverpool*, which last-mentioned vessel he then proposed to load at *New York* with goods for the said islands of *St. Bartholomew* and *St. Thomas*, and directed the captain of the *Arabella*, after finishing his trading at *Barbadoes*, to proceed to *St. Bartholomew* and *St. Thomas*, for the purpose of obtaining information in regard to the state of the market, and on other subjects at those islands, with the view of forming his opinion upon the speculation he proposed to enter into by the said ship *Alice* from *New York* to those islands. The *Arabella* arrived at *Barbadoes* on the 5th March, 1817, where she discharged her cargo, and received on board a quantity of sugar, with which she sailed for
New

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 HAMMOND
 against
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New York on the 4th of *April* following, intending to call at *St. Bartholomew's* and *St. Thomas's*, two of the *Leeward* islands, in her way to *New York*. In the course of this voyage, after having passed the islands of *St. Bartholomew* and *St. Thomas*, she was lost off *Savannah*. When the ship sailed from *Barbadoes*, on the 4th of *April*, her objects of trade were at an end, until she should arrive at *New York*, and she proceeded to the islands of *St. Bartholomew* and *St. Thomas* only to obtain information for the purpose before stated.

Littledale, for the plaintiff, contended, that the going to the islands of *St. Bartholomew* and *St. Thomas* was no deviation. Here is an express leave given to touch at all or any of the *Windward* or *Leeward* islands. Under that liberty the vessel had a right to go to the islands in question. And, besides, the intelligence obtained there might probably have some effect on her ultimate destination.

F. Pollock, contra, after citing *Rucker v. Allnutt* (a), and *Langhorn v. Allnutt* (b), was stopped by the Court.

ABBOTT C. J. This calling at the islands of *St. Bartholomew* and *St. Thomas* was for a purpose wholly unconnected with the voyage in question. If, as it was said, the intelligence to be obtained there would be likely to have altered the destination of the ship, the question would be different. But the contrary is expressly stated in the case; for it is stated that it had reference to some new adventure to be subsequently

(a) 15 *East*. 278,(a) 4 *Taunt*. 519.

undertaken in another vessel. I think, therefore, that this being a calling for a purpose entirely unconnected with the voyage was, notwithstanding the words in the policy, a deviation, and that the plaintiff is not entitled to recover.

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against
Rttd.

Per Curiam,

Judgment for the Defendant.

The KING *against* The Inhabitants of the
Township of HATFIELD.

Saturday,
November 18th.

INDICTMENT against the defendants for non-repair of a highway. The first count alleged a prescription, that the defendants, from time immemorial, had repaired and been accustomed to repair, and of right ought to have repaired, and still of right ought to repair, as often as it should be necessary, such and so many of the common king's highways, situate within their township, as would otherwise, and but for such usage or prescription, be repairable by the inhabitants of the parish of *Hatfield* at large. The second count varied only in stating the prescription to be for the several and respective townships, &c. within the parish of *Hatfield*, to repair separately from each other the several roads situate within each township, &c. respectively. Plea, general issue. At the trial at the last *York* assizes, before *Bayley* J., a verdict for the crown was found by the jury, subject to the opinion of this Court on a case, which stated, that the road, a part of which formed the subject of this indictment, was one lead-

Where in an indictment against a township for non-repair of a road, the prescription stated and proved was, that its inhabitants had been immemorially used to repair all roads situate within it, which, but for such usage, would be repairable by the parish at large: Held, that this places the township in the situation of a parish, and that it is necessary for the Defendants to shew by evidence some other persons in certainty who are liable, in order to deliver themselves from their liability to repair.

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leading from *Doncaster* to *Epworth*, and other places in the county of *Lincoln*. Its course lay along a bank commonly called the *Low Level Bank*, elevated one or two feet above the adjacent country. It was bounded on one side by a large open drain, and on the other by fence ditches. This bank was made by the earth of the drain. By articles of agreement, dated 24th *May*, in the second year of the reign of *Charles* the First, between that king and *Cornelius Vermuyden*, Esq., which recited that the king was seised in fee of *Hatfield Chase* and *Ditch Marsh*, and of divers manors and lands adjoining, and that certain lands, wastes, commons, and waste grounds, situate, lying, and being upon each side of the river *Idle*, and abutting on the rivers *Dun* and *Ayre* to the north, and the river *Trent* towards the south, being parcel of the said premises, and containing by estimation 60,000 acres or thereabouts, were subject to be surrounded and drowned with water in such manner that little or no benefit could be made thereof, unless special care were taken for innings and draining the same. The said articles contained an agreement on the part of *Cornelius Vermuyden* to drain these lands, in consideration of himself or his nominees having the fee-simple of one-third part of the lands when drained. In this agreement were the following clauses: "And it is further agreed, and his majesty doth hereby declare, that the said *Cornelius Vermuyden*, and others the parties aforesaid, shall and may, at their wills and pleasures, and as to him or them shall be thought most necessary and expedient, cut, dig, and make or cause to be made, such and so many channels, watercourses, banks, highways, sosses, sluices, and other receptacles for water, and shall have for himself and his servants and workmen,

men, with carts and carriages fit and convenient, free ingress and regress for the perfecting and performance of the said works, and draining the lands and grounds aforesaid, without the let, denial, hindrance, or interruption of any person or persons whatsoever, and shall also have and take such quantity and proportion of earth, reed, and other things and materials within the said grounds for perfecting the said work as by him or them shall be thought necessary and useful. and shall also have for his and their use and uses, freely, without interruption, the benefit of all and singular channels, watercourses, and sluices, which are now already made or digged within the said lands or grounds, and the same to turn, change, or alter for the more necessary draining of the said grounds, and perfecting the said works, or as he or they shall think fit; and it is hereby further concluded and agreed, that if the said *Cornelius Vermuyden*, and other the parties and undertakers by him to be employed as aforesaid, shall have cause at any time or times to use any of the lands and grounds lying or being without the compass of the grounds hereby intended to be drained and laid dry as aforesaid, and not subject to surrounding for any passage of water or otherwise, then it shall and may be lawful to and for the said *Cornelius Vermuyden*, and other the parties aforesaid, to use the same, so far as shall be necessary, in and for the performance of the said works. The drainage having been partly executed in the 11th year of the reign of *Charles the First*, 12,459 acres, being one third part of the lands then drained, were, in pursuance of the above agreement, conveyed in fee to Sir *Wm. Curteine* and others, the nominees of *Cornelius Vermuyden*. The participants of the *Level*
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of *Hatfield Chase* were the persons who were the owners of the lands subsequently conveyed, under the above articles, to *Cornelius Vermuyden* or his nominees. The road in question, which ran through these lands, had been, as far back as living memory went, repaired by the participants out of their general scots. These repairs were made by sand which was brought from a distance, and by throwing soil from the adjacent drains, when cleansed out by the participants, for the purposes of the drainage, sand being the usual material for the repairs of that road. The participants were not a corporation, nor was it ascertained at the trial who all the different individuals, composing that body, were, though the names of some were proved. No repairs were proved to have been done by the defendants upon the particular road indicted; but their prescriptive liability, as stated in the indictment, was proved. The question for the opinion of the Court was, whether the inhabitants of the township of *Hatfield* were liable to repair this road; and the Court were to be at liberty to make any presumption which they should think the jury ought to have made.

E. Alderson, for the crown. The prescription is, in this case, that the defendants are bound to repair all the roads within their township, which would ordinarily be repaired by the parish. They are, therefore, to be considered in the same point of view as the inhabitants of a parish, *Rex v. Netherthong* (a). Now, if so, they must throw the liability on some other persons, or they will be liable themselves. Here the participants are the

(a) 2 B. & A. 179.

only persons who can be contended to be liable; and their liability can only arise in one of two ways, either by reason of tenure or by reason of inclosure. Both these are put an end to by the facts in the case. The road is described as on a bank, formed by the earth out of the adjacent drain. It had its origin, therefore, subsequently to the drain. Now, the drainage was in the 2 Car. 1.; and, therefore, the road is not immemorial. And, to make the parties liable *ratione tenuræ*, it must be an immemorial road. *Rex v. Stoughton.* (a) Nor can the participants be liable to repair *ratione clausuræ*, because it also appears that the drain which caused the *clausura* was anterior to the road. The rights of the public have, therefore, never been abridged by the inclosure, which is the foundation for this species of liability. Then, if so, the participants are not liable; and the consequence will be, that the defendants are so. As to the repairs, they are very trifling; and, admitting that they raise a presumption that the participants are liable, that presumption is rebutted by the other facts in the case.

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Parke, *contra*. It is quite clear that this is a public highway, which, so far back as living memory can go, has been repaired by the participants, and never by the defendants. Every presumption ought, therefore, to be made, in favour of such long and uninterrupted usage. It does not, by any means, appear clear, that this was not an immemorial highway; for though it might be posterior to the formation of the drain, still there is nothing to shew, that the drain itself was not an

(a) 2 *Saund.* 158. *d. n.* 9,

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against
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ants of
HATFIELD.**

immemorial drain. The agreement with *Vermuyden*, set out in the case, speaks of drains and passages for water, as already existing before the drainage by him. [Abbott C. J. Even supposing that to be so, still the question recurs, by whom was that road previously repairable? If by the crown, all the waste lands would then have been liable to the burthen; and it is not shewn who is in possession of them.] Although all the lands might be liable to contribute, yet an indictment might be sustained against the participants, who are in possession of a part. *Regina v. Duchess of Buccleugh*. (a) And if not, it would still be an answer to the present indictment, which is against a township, and not a parish. It is therefore sufficient to shew, that some others are liable, without fixing on the individuals, or shewing, in certain, what lands are chargeable with the burthen; for such evidence negatives the special liability imposed by custom, contrary to the common law, on the township. *Rex v. Stoughton*. (b) [Holroyd J. There is a difference between cases, where the indictment charges a special prescription to repair a particular road, and a general prescription to repair all roads, within the township, as here. In the former case, the rule is, as it is stated; but, in the latter, the defendant must shew, by evidence, some certain persons bound to the repair. I remember this distinction to have been taken, in a case tried before Mr. J. *Chambre*.] Here, too, a presumption may be made, that the individual third part, assigned to the participants, was the part immemorially bound. Secondly, these lands might have been granted by the

(a) 1 *Salk*, 358., and 3 *Vin. Abr.* tit. Apportionment, 5 pl. 9.

(b) 159. a. n. 10.

crown,

crown, subject to this burden, and that will be sufficient. [*Abbott C. J.* Here the grant is stated in the case; and no such condition is to be found in it, which negatives such a presumption.] But even if the Court think that there is not sufficient ground to presume a liability, *ratione tenuræ*, still these participants may be liable, *ratione clausuræ*; for there is nothing to shew, that the fence-ditches, which bound the road on one side, were not posterior to the road. And if an owner incloses land on one side, which has been anciently inclosed on the other, he ought to repair all the way. *Rex v. Stoughton.* (a)

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E. Alderson, in reply, was stopped by the Court.

ABBOTT C. J. The prescription stated in this indictment, and which has been proved in evidence, is one which places the inhabitants of this township in the same situation as the inhabitants of a parish, as to their legal liability to the repair of roads locally situated within their district. This circumstance distinguishes the case from those where the prescription stated on the record applies only to the particular road indicted. Then the question is, whether, in this case, the defendants have, with any degree of certainty, shewn, that any other persons are liable to the burden: If the case had stopped with the repairs done by the participants, it would have been sufficient; but it does not; for we have the history of those participants stated in it, who are, it seems, the representatives of *Cornelius Vermuyden*, to whom King *Charles* the First assigned one-third of

(a) 161. n. 12.

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certain crown lands, then of little value, as a compensation for draining the whole. In pursuance of this agreement, the drain and bank were, in all probability, executed; and on the bank this road has since been made. I am, therefore, not at all satisfied that the road had any immemorial existence; and if so, that reduces the commencement of the repair, given in evidence, to the reign of *Charles* the First, which negatives any prescriptive liability on the part of these participants. I do not think, therefore, that the defendants have established, that the participants are liable, *ratione tenuræ*. And the circumstances seem also to me to negative their liability, by reason of inclosure. Upon the whole, I am of opinion, that there must be judgment for the crown.

BAYLEY J. I am of the same opinion. The prescription stated in this indictment makes the township, for all legal purposes, as to repair of roads, a parish. Then, if so, these defendants are liable, unless they can throw the burden on some other persons. I entirely agree with my Lord Chief Justice, that, from the circumstances stated in this case, we cannot make the presumption, that this was an immemorial highway, or that the participants are liable to repair it, *ratione tenuræ*. The repairs done by them are either referable altogether to mistake, or to a disinclination, on their part, to throw the burden on the township.

HOLROYD J. In this case the township is, by the prescription, placed on the same footing as a parish, both as to immemorial roads, and also as to any new highways which may have been subsequently made; and, there-

therefore, whether the road indicted be an immemorial highway or not, the defendants must repair it, unless they can shew with certainty some other persons who are liable. The usage to repair, proved at the trial, would have been conclusive against the participants, unless there had been evidence to rebut it. That evidence, however, seems to me to be satisfactory. Here the wastes and commons originally surrounded by rivers were drained, and one-third part of them was allotted as a reward to *Vermuyden*, for the drainage. This formed a new division, which had not existed before, and the repairs proved are only co-extensive with that new division. It seems to me, therefore, to follow, as a very strong presumption, that the usage to repair could not have had any existence, previously to the drainage, but commenced at that time; for if it had commenced before, in all probability other lands, as well as those of the participants, would have also been chargeable. I think, therefore, that the defendants have failed in making out, that the participants are liable, *ratione tenuræ*. As to their liability, *ratione clausuræ*, it appears on the evidence, that the road was contemporaneous with the inclosure. But if it were clear, that the fence ditches were made at a subsequent period, still that would not make the participants, as a body, liable, but only those persons who actually made and continued the inclosure; and we have no evidence to shew who those persons were, or that they ever repaired the road. I am, therefore, of opinion, that there must be judgment for the Crown.

BEST J., having been absent in the bail-court, during the argument, gave no opinion.

Judgment for the Crown.

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Saturday,
November 18th.

The KING *against* The Inhabitants of BROTTON.

By an indenture of apprenticeship it was stipulated, that the master should provide meat, &c. during the term, except in the winter seasons, when the ship to which the apprentice belonged should be laid by unrigged; during which time the apprentice was to be maintained by himself or friends, the master paying a compensation. Under this stipulation, the apprentice, during the winter, resided with his parents in the township of B. for more than forty days, not doing any work for his master during such residence: Held, that this was not a residence under the indenture, and conferred no settlement.

UPON appeal against an order of two justices, by which *Solomon Marshall*, his wife, and two children, were removed from the township of *Whitby*, to the township of *Brotton*, in the North Riding of the county of *York*, the sessions confirmed the order, subject to the opinion of this Court, upon the following case:

The pauper, *Solomon Marshall*, was bound apprentice for the term of four years, by indenture, bearing date the 11th of *March*, 1813, and made between *Solomon Marshall* the elder, and *Solomon Marshall* the younger, of the one part, and one *Addison Brown*, master-mariner and ship-owner, of the other part. In which indenture it was provided, amongst other things, that the said master should find and provide for his said apprentice sufficient meat, drink, washing, and lodging, during the said term, *except in the winter seasons, when the ship to which he should belong should be laid by unrigged, during which time it was agreed, that the said apprentice should maintain himself, or be maintained by his friends*; and in lieu and satisfaction thereof, the said master should pay him, the said apprentice, the sum of 6s. a-week, weekly and every week during such time as the said apprentice should not be maintained by his said master; and that the said master should pay, or cause to be paid, unto the said apprentice, as and for wages for such his service, the sum of 75*l.*, in manner following; (that is to say,) 12*l.* for the first year; 16*l.* for the second year; 20*l.* for the third year; and 27*l.* for the fourth year; also 12s. a-year for washing. The said pauper, while the ship

was

was laid up at *Whitby*, in which he served his said master as an apprentice, during the apprenticeship, resided, occasionally, during the winter, with his parents, in *Brotton*; and in the whole, for considerably more than forty days; and he slept the last night, during the continuance of the apprenticeship, at *Brotton*. *Brotton* is twenty miles distance from *Whitby*, and the pauper did not do any work for his master while he resided there, but was liable to have been recalled by his master at any time, if he had been wanted at the ship. The sessions were of opinion, that by this residence at *Brotton* a settlement was gained.

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Tindal, in support of the order of sessions. This was a residence under the indenture; for it is expressly stipulated, in the indenture, that when the ship was laid up, in the winter season, the apprentice should reside with his friends; and this distinguishes the present case from *Rex v. St. Mary Bredin* (a), where no such stipulation existed, and no settlement was gained. If there had been any clause in this indenture, enabling the apprentice to work for any other person, it would be different. But there is no such stipulation here.

Bolland, contra. This case falls within the principle laid down in *Rex v. St. Mary Bredin*. That principle was this, that a residence, in order to confer a settlement, must be connected with a service to the master at the time. Here it is not so connected; for no act of service to the master was done or contemplated during this residence at *Brotton*.

(a) 2 B. & A. 382.

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Brotton.

ABBOTT C. J. This appears to me to be a stronger case than the one which has been cited, and that on the very ground on which it has been attempted to be distinguished from it. Here there was a distinct stipulation in the indenture, by which the master dispensed with the service of his apprentice, during the winter season, the period when this residence at *Brotton* took place. The residence, therefore, is not at all connected with a service; but is, by the very words of the indenture, disconnected from it. Then the case cited is an express authority to shew, that an apprentice, by such a residence, does not acquire a settlement. The order of sessions, must, therefore, be quashed.

Order of Sessions quashed.

Monday,
November 20th.

The KING *against* The Justices of the County
of CARNARVON.

The Court of K. B. has no jurisdiction to review the judgment of the quarter sessions, except on a case sent up for their consideration; and, therefore, where the sessions, having heard the witnesses on one side, had refused to hear those on the other side in an appeal, on the ground that

their testimony had been prefaced by observations on the part of the advocate contrary to their usual practice, the Court refused to grant a mandamus to rehear the appeal.

D'OYLY Serjt. moved for a rule nisi for a mandamus, to be directed to the justices of *Carnarvonshire*, commanding them to enter continuances, and re-hear an appeal between two parishes, touching the settlement of a pauper. It appeared from the affidavits, that the appeal came on at the sessions on the 14th of *July* last, and that the appellants having admitted a *prima facie* settlement in this parish, relied upon the proof of a case of a subsequently acquired settlement elsewhere. Having finished their case, the attorney for

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the respondents proceeded to make observations upon the case proved by the appellants, and then offered to call witnesses to contradict it; but the sessions refused to allow those witnesses to be called, on the ground that he had rested his case on his argument as to the insufficiency of the case proved on the other side; and thereupon they quashed the order of removal. The affidavits further stated, that the course pursued by the attorney for the respondents was the usual and ordinary practice of the sessions. *D'Oyly*, in support of the motion, contended, that the refusal on the part of the sessions to hear the witnesses was in fact a refusal to hear the appeal altogether, in which case it was every day's practice for this Court to direct the sessions by mandamus to hear and decide the question.

BAYLEY J. There is no instance, I believe, which can be found where this Court have interfered by mandamus to direct the justices to re-hear an appeal which they have once already heard. In this case they entered into the consideration of this appeal; and, after having heard it, they have decided that the respondents ought not to be allowed to call witnesses in reply. It is possible that in that decision they may have been wrong; but it seems to me that we are not at liberty to enter into that question, as no case has been sent up for our consideration. If we were to do so, we should constitute this Court a Court of Appeal from the Quarter Sessions, and we should have applications continually made to us to overturn their determinations, on the ground of the improper reception or rejection of evidence, and be called upon to review their judgment, although no case has been sent to us for that purpose.

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It is the duty of Sessions to hear and decide; and, if they entertain any doubts, to submit them to this Court; but where they do not desire our interference, we have no jurisdiction.

HOLROYD J. If it had appeared in this case that the Sessions had heard one side, and had altogether refused to hear the other, I should have thought it the same as if the case had not been heard at all, and I should then have been of opinion that this mandamus ought to issue; but, in this case, it appears to me that this was merely a question as to the practice of the Sessions, who have determined that the evidence tendered ought not to have been introduced with observations on the part of the advocate. I think, therefore, that this Court has no jurisdiction to interfere in such a case.

BEST J. (*a*), concurred.

Rule refused.

(*a*) Abbott C. J. had left the Court.

Tuesday,
November 21st.

BYLES *against* WILTON, Gentleman, one, &c.

An attorney in custody for debt loses his privilege, and may be detained upon mesne process

GURNEY had obtained a rule nisi for entering an exoneretur on the bail-piece filed in this cause for irregularity. It appeared from the affidavits, that the defendant was an attorney of this court, and that having been for some time in custody in the *Marshalsea* for debts due to other persons, the plaintiff, on the 12th *July* last, filed his bill against him as an attorney, and, on the

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13th *July*, delivered the bill, with the usual certificate of the clerk of the rules indorsed thereon, to one of the turnkeys of the prison, for the purpose of detaining the defendant in custody. The bail justified on the 3d *August*.

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Scarlett now shewed cause, and contended that as it appeared from the affidavits, that the defendant was already in custody, he had lost his privilege as an attorney.

Gurney and *F. Pollock*, contra, referred to *Kaye v. Denew* (a), and *Prior v. Moore* (b), as recognising a distinction between the cases where an attorney appears for others, and where he is sued or sues himself; but contended that at all events this rule must be absolute, because the declaration stated him to be "present here in court," and so treated him as a person having privilege, which was inconsistent with the mode of its service.

The Court held that, being in custody, the defendant was not entitled to his privilege, the ground for allowing privilege being, that an attorney is an officer continually attending upon the Court. In this case, however, he cannot do so; and this is like an attorney ceasing to practice, who loses thereby his privilege. But as the declaration was defective, they discharged the rule without costs, giving, at the same time, liberty to the plaintiff to amend his bill.

Rule accordingly. (c)

(a) 7 T. R. 671.

(b) 2 M. & S. 606.

(c) See *Windmil v. Cutting*, 1 Str. 191.

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Tuesday,
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Ex parte LEACROFT, Gentleman, one, &c.

An agent employed to take out an attorney's annual certificate, having neglected so to do, and the attorney having from ignorance of the fact continued to practise, the Court will only allow him to be re-admitted upon payment of the arrears and a fine.

READER moved that this person might be re-admitted as an attorney without the payment of any fine. It appeared that he had employed an agent to take out his certificate annually, and had continued to practise up to the time of the application; but his agent had neglected to do it. As soon as he had discovered it, the present application was made to the Court.

ABBOTT C. J. said, that the Court had had many applications of this sort, and that they thought it expedient, for the good of the profession, that attorneys should take care to make enquiries, and to inform themselves as to the fact whether such certificates were taken out, and to have such certificate sent down to them annually. And that, therefore, in order to establish this as a rule on this subject, they would not in any instance, re-admit, without a fine being also paid. In the present case, however, they would only impose a small fine for the purpose of marking the rule; and, therefore, they ordered that the party should be re-admitted on the payment of the arrears of duty and a fine of 5*l*.

Rule accordingly.

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FARMER and Another *against* THORLEY and
Another.

Thursday,
November 23d.

PULLER, on a former day having obtained a rule for staying all proceedings upon the bail-bond in this case,

The bail to the sheriff are discharged by the defendant's giving a cognovit for payment of debt and costs.

Bolland now shewed cause, and the facts appeared to be, that on the 4th *May* last, a bill of *Middlesex*, returnable on the 8th of *May*, issued at the suit of the plaintiffs against the principal, when the present defendants became bail to the sheriff, and executed the usual bail-bond; that two days after the time which the bail had, by the practice of the Court, for putting in bail above, an agreement was entered into with the principal and his attorney, but wholly without the knowledge of the bail, for a cognovit, to secure and pay the debt on the 20th *July* following, which was after the close of *Trinity* term, and the attorney's costs were at the same time paid; and that on the 20th *September* following, an assignment of the bail-bond was taken, and writs sued out thereon, against the bail, returnable the first return of this term. It was insisted that the several cases where it has been decided that a cognovit, with stay of execution, is a discharge of the bail, apply only to bail above, and not to bail to the sheriff; the applications, in all these instances having been made on behalf of the bail above.

But the Court were of opinion, that bail to the sheriff were also discharged by such a proceeding, the plaintiffs having no right to proceed upon the bond,
unless

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unless there was a continuing breach, which could not be, where a cognovit had been taken, that being an admission by the plaintiffs, that the defendant had appeared to the action, and was properly in Court.

Rule absolute.

Friday,
November 24th.

ROBERTS *against* GOFF.

This Court will set aside a judgment founded on an usurious security, without compelling the defendant to repay the principal and interest.

PULLER had obtained a rule, calling upon the plaintiff to shew cause why the judgment entered on the warrant of attorney in this case, and the execution thereof, should not be set aside, and the warrant of attorney be delivered up to be cancelled, on the ground of usury.

Dwarris now shewed cause, and contended, that even if the Court were satisfied of the usury, after the parties had acted on the agreement, and time had been asked and given, they could not now set aside the judgment, and direct the security to be cancelled, but upon the terms of the party paying the money actually advanced, with legal interest, this being an application to the equitable jurisdiction of the Court, which would compel the party applying to do what is equitable and reasonable; and he cited *Hindle and O'Brien*, 1 *Taunton*, 413.

BAILEY J. (a) We cannot impose such terms. The instrument is void. It is not good at law. The con-

(a) *Abbott* C, J. had left the Court.

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struction and practice of this Court have always been different; and I have reason to know, that some of the learned persons who argued that case in the Common Pleas, were not, at the time, at all satisfied with the decision.

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HOLROYD and BEST J. concurred.

Rule absolute.

TAYLOR and Others *against* HARRIS.

Saturday,
November 25th.

ASSUMPSIT for the price of goods sold to the defendant, one of the proprietors of *Covent Garden* theatre. The defendant pleaded in abatement, in the usual form, that four other persons (naming them) were jointly liable with himself. *Carter*, upon this, obtained a rule to shew cause why the defendant should not forthwith deliver to the Plaintiffs, or their attorney, particulars in writing of the places of residence and additions of the several persons mentioned in this plea, or why, in default thereof, the plea should not be set aside. The affidavit stated, that the plaintiffs had no knowledge whatever of the places of residence of these persons, nor where they could be met with, and that, in order to become acquainted with the same, for the purpose of ascertaining the truth of the plea, or whether it would be advisable or not to abandon the proceedings in the action, they had made application to the defendant's attorney (the defendant himself being absent in *Ireland*), and also to the person who had made the affidavit of the truth of the plea, and to the

treas-

Defendant having pleaded in abatement that four others were jointly liable with himself, the plaintiff applied to the defendant's attorney to give the places of residence and additions of those persons, which he refused, unless the action were discontinued. Under these circumstances the Court made a rule absolute for the defendant to deliver such particulars, or in default thereof for setting aside the plea.

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treasurer of the theatre, for the required information; but that these parties had refused to give it, except upon condition that the action against the defendant should be discontinued.

Moore shewed cause against the rule, and contended, that the defendant had done all he was bound to do, by giving the plaintiffs a better writ, and that, at all events, the condition of discontinuing the action was reasonable.

The Court held, that substantially the defendant had not given to the plaintiffs a better writ, and that the information ought to be given without any such condition as had been required. For, possibly, the plaintiffs might ascertain, when the information was given, that the present action was proper, and might choose to reply to the plea, rather than abandon the action.

Rule absolute.

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The KING against Sir FRANCIS BURDETT, Bart.

Monday,
November 27th.

THE Attorney and Solicitor-General, with whom were Vaughan Serjt., Clarke, Reader, and Balguy, were heard in last term against the rule for the new trial. (Vide Vol. III. p. 717.) Besides the cases referred to in their argument, they cited *The King v. Hensey* (a), to shew that the circumstance of a letter being dated in a given place was evidence that it was written there. *Scarlett* was then heard in support of the rule; and, in this term, *Denman*, *Phillipps*, *Blackburne*, and *Evans*, were heard on the same side. The arguments in support of the rule were as follow: (b)

On an information for writing, composing, and publishing a libel in the county of L. it appeared that the defendant, on the 22d August, wrote and composed the libel in L., and that he was seen in L. on that and the following day. On the 24th, the libel was delivered in the county of M. (100 miles off) by A. to B., being inclosed in an envelope addressed to A., containing

written directions to A. to forward the libel to B., by whom it was subsequently published in M. The envelope was open; and it was not proved that there was on it any trace of a seal or post-mark. A. was not called at the trial as a witness by either party; nor was it proved that he was a resident, or had been about that time in L.: Held, by three Justices, (dissentiente Bayley J.) that this was evidence on which the jury might properly be left to presume that the libel was delivered open to A. in L.

Held, also, by three justices, (Bayley J. dubitante,) that a delivery at the post-office in L. of a sealed letter, inclosing a libel, is a publication of the libel in L. Held, also, by three Justices, (Bayley J. dubitante) where a defendant writes and composes a libel in L. with the intent to publish, and afterwards publishes it in M., that he may be indicted for a misdemeanor in either county.

And, *per totam Curiam*, where a libel imputes to others the commission of a triable crime: Held, that evidence of the truth of it is inadmissible. Held, also, where, in summing up, the Judge told the jury that the intention was to be collected from the paper itself, unless explained by the mode of publication or other circumstances; and that, if its contents were likely to excite sedition, &c. defendant must be presumed to intend that which his act was likely to produce; and that, if they found such to be the intent, he was of opinion it was a libel; and that they were to take the law from him, unless they were satisfied that he was wrong; that this was a correct mode of leaving the question to the jury under 32 G. 3. c. 60. s. 1.

Quære, whether the writing and composing of a libel with intent to publish, but not followed by publication, be an offence.

(a) 1 Burr. 642.

(b) See the evidence at length in the judgment of Best J.

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duced by the communication of slander to the minds of others, by writing. No crime is therefore committed until the slander is so communicated; or, in other words, until the publication, for till then there can be no tendency to a breach of the peace. This is deducible from the very nature of the crime. It has been observed by Mr. *Starkie*, in his preface to the *Law of Libel*, that crimes which affect the visible property or persons of men, are much more obvious to the understanding than the crime of libel, which is of a more intellectual nature; and, therefore, the law respecting the former is much more likely to be founded on just principles in its commencement in the more simple state of society, than those laws which, arising out of a more complicated state of society, and relating to a more refined object, call for more refinement in observation and greater discrimination between the good to be done by enacting penalties, and the mischief to be done by repressing a practice generally useful. One of the most refined conclusions at which a refined state of society can arrive, is, that a man should have a solid property in his reputation. It is one of the greatest privileges that belong to the nature of man, that he possesses a sensibility to fame and a love of glory, and that the individual, by the combination of opinion and the force of character, begets in his own reputation a property more valuable than the mere materials to which the crude notions of property are first applied. The circulation of written papers, and the art of printing, would give rise to great variety in the degrees of this offence. When it was found to injure the opinion and respect in which a man was held, or by which the government was supported, as the character of individuals as well as the security of a government, not upheld by
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brute force, are founded on opinion and respect, it became important to punish those who destroyed that opinion and respect by written slander. It was long after it was the habit in enlightened *Rome* for every man of respectable rank to be in possession of books, that the law *De libellis famosus* was promulgated. [*Abbott C. J. Cicero*, in a fragment of his, Book 4. "De Republica," says, that it was to be found amongst the laws of Twelve Tables.] That passage in *Cicero* has a reference to the practice of exhibiting individuals on the stage. It is to be found in the fragments of his book "De Republica," preserved by *St. Augustine* in his book "De Civitate Dei," and the passage is as follows: "Nostræ contra duodecim tabulæ cum perpauca res capite sanxisent, in hanc quoque sancendam. putaverunt; si quis actitavisset, sive carmen condidisset, quod infamiam afferret flagitiumve alteri; præclare, judiciis enim ac magistratum disceptationibus legitimis propositam viam non poetarum ingeniis habere debemus, nec probrum audire, nisi ea lege ut respondere liceat et iudicio defendere." The *probrum audire* refers to the hearing the actor, who represents the character attacked by the *malum carmen* of the poet. In one of the fragments of the same work, also preserved by the same author, *St. Augustine*, there is a reference to the poets who composed for representation, "probris et injuriis poetarum subjectam vitam famamque habere noluerunt capite etiam puniri sancientes tale carmen condere si quis auderet." By *tale carmen* is meant such a composition as was actually represented on the stage, and not a mere private unpublished composition. In order to explain this, some illustration may be found among the poets themselves, and particularly in the 2d book of *Horace's* Epistles,

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verse 139., where he alludes to the very Law of the Twelve Tables, by which the infamy must have been attached and fixed to the individual by representation, which was a publication. The words of the law are these: “ Si quis occentasset malum carmen sive *condidisset* quod infamiam faxit flagitiumve alteri, capital esto.” The words, it is to be observed, are not *ad infamiam tendens* but *infamiam faxit*; and so in the interpretation of *Cicero*, in the fragment quoted, the words are, “ quod infamiam afferret flagitiumve alteri.” It would seem, therefore, that the infamy must have attached, and that the mischief must have occurred before punishment could be inflicted on the author or actor. It appears also, from *Suetonius, De Vita Augusti, c. 55.*, that the law de famosis libellis did not exist in early times in *Rome*. “ Etiam sparsos, de se in curia famosos libellos, nec expavit nec magnâ curâ redarguit: Ac ne requisitis quidem auctoribus: Id modo censuit cognoscendum posthac de iis qui libellos aut carmina ad infamiam cujuspian, sub alieno nomine edant.” It is remarkable, that *Augustus*, if there was already in existence a law to punish libels with death, should not only have prosecuted none of them against himself, but should have introduced another law to subject those which were anonymous to legal restraint. *Tacitus*, in the first book of his annals, says, “ Primus *Augustus* cognitionem de famosis libellis specie legis ejus (i. e. legis majestatis) tractavit; commotus *Cassii Severi* libidine, quâ viros foeminasque illustres procacibus scriptis diffamaverat.” And *Suetonius*, in his life of *Tiberius*, has this passage on the subject of libels, chapter 28. “ Adversus convitia malosque rumores, et famosa de se ac suis carmina firmus ac patiens, subinde jactabat in civitate liberâ linguam mentemque liberas
esse

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esse debere. Et quondam Senatu cognitionem de ejusmodi criminibus ac reis flagitante, non tantum inquit otii habemus ut implicare nos pluribus negotiis debeamus." So that when the Senate requested him to punish those who circulated libels against him, *Tiberius* replied "that he should have too much upon his hands, if he were to add any care of his own person and reputation to that which he was bound to bestow upon the safety and dignity of the state." The same author says of *Julius Cæsar*, that he was so regardless of certain epigrammata famosa and scurrilous verses that were current against him, that he proposed a reconciliation with one of the authors, and invited another to sup with him. Now, notwithstanding the clemency of *Cæsar*, it is extraordinary that such things should circulate if they were the subject of capital punishment. It seems unaccountable, indeed, how the word *famosus* was introduced unless it had a reference to publication. The very word has relation to a thing bruited abroad and bottomed in fame. In the best period of *Roman* literature, it had, indeed, acquired a bad meaning. *Cicero* uses *famosa* to express a courtesan, "ad famosas mater me vetat accedere," where it combines the reputation of being *public* with an actual want of chastity. So, there is a passage in *Horace*, "Si quis mœchus foret, aut siccarius, aut aliqui famosus." Here *aliqui famosus* means otherwise notorious for some vice. The word *famosus*, therefore, in its natural sense refers to notoriety. Unless that notoriety is effected in a libel by its publication where is the offence? There must be something done to stimulate individual revenge or public discontent. If it is kept secret it wants the very essence of the meaning of the word *famosus*, by which the civilians describe

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it. The very essence of the crime, whether it be against an individual or the public; whether we look to the nature of the crime itself, or the word by which it is described, consists in the publication. The passages already referred to from the civil law, apply to a case of publication; for, to make it a crime, according to those authorities, it must be *ad infamiam*. It cannot be *ad infamiam* unless the fame of some person be affected by it, and that cannot be done unless it is published.

Lord Coke, in *Lamb's* case, means to say, that the actual publisher was guilty, though he was neither the writer nor composer. Assuming the publication, he says this; "That every man who shall be convicted of a libel, either ought to be a contriver of the libel, or a malicious publisher of it, knowing it to be a libel;" meaning, that if he is the malicious publisher, though neither the author or contriver, he is guilty of the libel. If this be taken according to the very letter, it would not only establish, that the writing, without publication, would be an offence, but that the person who publishes it, without knowing it to be a libel, would be guilty of no offence which is contrary to the law as now established. Mr. Starkie, in his treatise on the *Law of Libel*, after reviewing all the cases upon the subject, seems to be of opinion, that by the law, as now understood, publication is necessary, to constitute the offence; and that opinion has generally prevailed in the profession, since the case of *Entick v. Carrington*. (a) The case of *The King v. Payne*, no judgment ever having been pronounced in it, must be considered as one of doubtful authority. The opinion of the Court, as given in

(a) 19 Howell. St. Tr. 1030.

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5 *Mod.* 167., is this: “The making of a libel is an offence, though never published; and if one dictate and another write, both are guilty of making it. To what purpose should any one write or copy after another, but to shew his approbation of the contents, and to enable him to keep it in his memory, that he may repeat it to others. Now though the bare reading of a libel may not be a crime, because a man may be surprised, and not understand what he is about to read; yet, when one takes it from another, and hears it spoken before he writes it, this cannot be by surprise, because he has time to exercise his thoughts before he writes; so that it is not a libel by repeating but by writing. If one repeat, and another write a libel, and a third approve what is written, they are all makers of it; for all persons who concur, and shew their assent and approbation to do an unlawful act, are guilty. So that murdering a man’s reputation, by a scandalous libel, may be compared to murdering his person; for if several are assisting and encouraging the man in the act, though the stroke was given by one, yet all are guilty of homicide.” According to this authority, if any man shews his friend an epigram, in which there is a reflection on another, and he takes a copy of it to look at for his amusement, he is guilty, because he may publish; but it might as well be contended that a man can be guilty of shooting at another by keeping a gun, merely because somebody might take it and charge it. Again, the offence of libel is compared to that of murder; but how is a man’s reputation murdered by a libel never published? In *The King v. Beare* (a), Lord Holt says, that “It was objected that writing a libel may be a lawful act, as by the clerk who draws the

(a) 1 *Ld. Raym.* 414. *Carth.* 407. 2 *Salk.* 417.

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indictment, or by a student who takes notes of it, and so the defendant's might be a lawful writing:" to which the judge said, "That the matter, abstractedly considered, is unlawful; therefore the general finding shall be taken to be criminal; and that if the writing was innocent, as in the case objected, there ought to be a special finding of those particulars which distinguish and excuse it. If an action be brought on the statute of maintenance it is sufficient to say quod manu tenuit, yet in some circumstances a man may lawfully maintain a suit as an attorney or near relation." The answer to the last observation is obvious; the words of a statute are always deemed sufficient in a declaration or indictment upon that statute; for the words must receive the same construction on the record as they do in the statute, and the defendant has, therefore, the opportunity, when charged in the words of the statute, of insisting upon all the proofs required, and making all the defences allowed by the statute. The principle laid down by Lord *Holt* is this: if a man should write a libel, or buy it of a bookseller, and keep the libel locked up in his closet, and there it should be found, the onus probandi is cast upon him, to shew an innocent intention. Look to the consequences of such a rule. It has been laid down that a man may be guilty of a libel on those who have gone before him, and even upon a foreign prince or government. Now, there is hardly any book that does not in some passage contain a libel on the living or the dead, on princes or on governments. Or, suppose a man writes a libel and puts it in his closet, who can prove his intention but himself? and he, if prosecuted, would not be a competent witness for that purpose. Lord *Holt* proceeds; "That the jury having found the defendant

defendant guilty of writing a libel, he must be taken to be guilty of writing the original, and a copy could not be given in evidence; on the other side, if the copy of a libel be a libel, then the writing of it is a great offence; but that people may not go away with a notion that writing of a copy, though by one that has no warrantable authority, is not libelling, the Chief Justice said, that such a copy contained all things necessary to the constitution of a libel, viz. the scandalous matter and the writing. It has the same pernicious consequences; for it perpetuates the memory of the thing, and some time or other comes to be published." That is an assumption, and Lord *Holt* had no right to assume that they would ever be published; and the possibility of their being subsequently published never can constitute an offence. There were authorities decided a very few years before *The King v. Beare*, fully justifying the doctrine laid down by Lord *Holt*, and which, no doubt, he had strongly in his mind at the time. In *The King v. Eades* (a), the defendant was tried at bar, in the second year of *James* the Second, on an information for commending a book in which were several seditious sentences and clauses, and convicted; and although there was a motion in arrest of judgment, on the ground that it was not averred that he either read or knew these sentences to be therein; yet, afterwards, all exceptions were waived, and, upon the defendant's submission, he was fined 100*l*. In *The King v. Williams* (b), the information was for publishing a libel, called "Dangerfield's Narrative." The defendant pleaded that by the law and custom of *England* the Speakers of the House of Commons signed and published the acts

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(a) 2 *Showers*, 468.(b) *Ib.* 471.

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of the house, and that he signed the paper in question as an act of and by order of the House. He was, however, fined 10,000*l.* for this offence. These cases would not be considered as authority at the present day, but they may possibly have been considered as such by Lord *Holt*, having been decisions which no act of parliament had reversed, and which no resolution of parliament had condemned. It is true that before the cases of *The King v. Payne* and *The King v. Beare*, the Revolution had intervened; but the statute for licensing the press was in existence after the Revolution. Upon the expiration of the licensing act, in the reign of *Charles the Second*, the Twelve Judges were assembled to discover whether the press might not be as effectually restrained by the common law as by that act. They came to this resolution, that it was criminal at common law not only to write public seditious papers and false news, but likewise to publish any news without a licence from the king, though it were true; and in *The King v. Harris (a)*, *Scroggs C. J.* lays down the same rule. Now Lord *Holt*, and the Judges who assisted him, some years after the Revolution, were placed in the same predicament as the Judges stood in at the expiration of the licensing act in the reign of *Charles the Second*. In the 5 *W. 3.* the licensing act, having been prolonged for one year, had expired. An ineffectual attempt was made to renew it in parliament. It was, therefore, not unnatural that Lord *Holt* and the other Judges might, to a certain extent, feel themselves bound by the authority of the Judges on the like occasion, and conceive that there was some principle of law that warranted them in the determination that they made in these

(a) 7 *Hovel's State Trials*, 929.

cases; and they might, perhaps, be willing rather to refer to antecedent authorities for the opinions they had imbibed than to the authority of those later Judges, whose memories were brought into merited odium, by their attempts to support arbitrary power. *The King v. Eades*, which was a prosecution for approving a libel, was, however, the only authority for that doctrine, which was again laid down in *The King v. Payne*. Lord Holt, indeed, refers to the authority of Lord Coke, in the case *De Libellis Famosis*, 5 Rep. 125. and to *Lamb's* case. The charge in the former case was, for composing and publishing a libel, and three points were resolved, first, every libel which is called *famosus libellus seu infamatoria scriptura*, is made either against a private man or against a magistrate or public person. If it be against a private man, it deserves severe punishment; for although the libel be made against one, yet it excites all those of the same family, kindred, or society, to revenge, and so tends *per consequens* to quarrels and breach of the peace, and may be the cause of shedding of blood, and of great inconvenience. Here Lord Coke gives the definition of the crime, and states it to consist in its tendency to excite a breach of the peace. But how can it tend to a breach of the peace unless the individual libelled, or some person connected with him, should see it. The very definition of the offence, therefore, shews that it lies in the publication. Lord Coke then states the different modes of publication; but there is nothing to shew that he thought that the bare act of writing, without publication, was a crime. In *Lamb's* case, 9 Rep. 59. a bill was exhibited in the Star Chamber against certain persons for publishing two libels, and the question was, what constituted that sort of publication which, in that particular

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tioular case, justified the conviction; and it was considered how far the writer or contriver of the libel should, in that case, be deemed the publisher; and Lord *Coke* says, "If a person writes a copy of a libel, and does not publish it to others, it is no publication; for every one who shall be convicted ought to be the contriver, procurer, or publisher of it, knowing it to be a libel; but it is great evidence that he published it when he, knowing it to be a libel, writes a copy of it, unless he can prove that he delivered it to a magistrate." Now, it is singular that Lord *Coke* should lay down with so much exactness the presumptive evidence of writing to support a charge of publication; and yet not mention that the act of writing alone, without publication, would constitute an offence. It appears, from the report of the same case in *Moore*, that the whole question was, what should be evidence of a publication. The case of *John of Northampton*, referred to by Lord *Holt*, is a case of publication, or at least if it does not sufficiently appear that the letter had been received, it is then ambiguous and of doubtful authority. It appears, from *Edwards* and *Wootton*. 12 *Coke*, 35. that it was even doubted in the Star Chamber whether a sending a libel to the party libelled was such a publication as to give that Court jurisdiction. It never could have been imagined, therefore, by those who presided there, that the mere writing without publication was criminal. *The King v. Knell* (a) was a mere nisi prius case, where the party is reported to have been found guilty of the printing, and acquitted of the publishing; but printing is a species of publication, for copies must at least be delivered out to be revised and corrected.

(a) 1 *Barnardiston*, 305.

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When the libel bill was in its progress through parliament, the Judges were summoned by the house of peers, and certain questions were put to them. And in answer to one of these questions, Lord Chief Baron *Eyre*, in delivering the opinion of the Judges, states expressly, that (a) “the crime consists in publishing a libel; a criminal intention in the writer is no part of the definition of the crime of libel at the common law.” This is an authority of the Twelve Judges in modern times, to shew that the offence consists in the publication. It is admitted, that to support a civil action there must be a publication; because, otherwise, there can be no damage. If so, there can be no wrong without publication, and shall it be said, that a man shall not have an action when there is no publication, because there is no wrong without publication, but that the king shall indict for the mere writing, when the individual is neither wronged in his character nor roused in his feelings? The public offence grows out of the private injury to the individual. It arises out of the injury to his name and reputation, which cannot be effected till the writing is published, or in other words, until its contents are communicated to the minds of others. It has been argued, that the offence of libel bears a strong analogy to forgery, at common law, and that inasmuch as the false making of an instrument, with intent to defraud, is an offence at common law, although the instrument never be uttered; it follows that the writing of a libel with intent to defame, is an offence, although that libel be never published. These offences, however, are very different in their nature. In the offence of forgery, the *crimen falsi* is completed by the very act of false making the instrument, accompanied with the intent to defraud. The offence of libelling, on

(a) 22 *How. St. Tr.* 300.

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the other hand, is not complete until the contents of the libel are communicated to the minds of others, because until that time the reputation of the party is not injured, nor is his resentment roused. If this doctrine is to prevail, that the mere writing is *primâ facie* criminal, there is not any one work that has adorned the literature of any country, or that has lashed the vices of any age, or that forms part of the intellectual riches of any nation, that might not have been the subject of criminal prosecution; and the extreme absurdity of such a consequence surely affords no inconsiderable argument, that the premises from which it is deduced are fallacious. The mere writing and composing a libel not followed by publication, is, therefore, no offence known to the criminal law of *England*.

It has been further argued, that where several acts constituting an offence, take place in different counties, the offender may be indicted in any of those counties; and that in this case, inasmuch as the offence is composed of the writing and publishing, and the writing took place in *Leicestershire*, that the defendant may be indicted in that county, although the libel was only published in *Middlesex*. The case of a windmill erected in one county and proving a nuisance in another, has been mentioned. Assuming that it may be indicted in the county where it operates as a nuisance, how is it to be abated? How is the sheriff to execute, out of his own county, the judgment *quod prosternatur nocumentum*. This shews that the party can only be indicted in that county where he does the act. In misdemeanors, which are trespasses, the venue must be laid in the county where the trespass is committed. This part of the case was so fully argued when the rule nisi was moved for; and

and the several authorities upon the subject so fully considered, that it is unnecessary to pursue it any further. If the rule contended for be the correct one, the power which it would give to the crown to multiply its tribunals would be indeed alarming. For, if a man, conceiving libellous matter, bought the paper, pen, and ink in *A.*, wrote the libel in *B.*, put it into the post in *C.*, and caused it to be delivered in *D.*, there to be published; then, according to the argument, the party might be indicted in any one of these four counties. And the crown would thereby have the power of selecting that county in which they might obtain a jury disposed to convict the defendant. Such an option would naturally excite a strong suspicion of partiality in the administration of criminal justice, and would, therefore, be against sound policy.

It has been further contended, that in this case there was evidence of a publication in *Leicestershire*; and it is said, that where a libel has been put into circulation by the act of the defendant, it must be taken to be published by him in the place in which he parted with the possession of it for the purpose of publication; and that, in this case, it was clear, at all events, from the evidence, that the defendant did part with the possession of the libel in *Leicestershire*, either by putting it into the post, or delivering to a servant or to some other person for the purpose of transmitting it to *London*. The case of *The King v. Watson* (a) was cited as an authority to shew that the putting a sealed letter into the post is a publication; but that is only a nisi prius case, and therefore of no great authority; and, besides, Lord *Ellenborough* did not decide that that was a publication, for there being no proof that it had the genuine post-mark on it, he held

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(a) 1 *Campb.* 215.

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the proof of publication insufficient. *Rex v. Williams* (a) was the case of sending a letter with intent to provoke a challenge; the letter sealed was put into the post-office in *Westminster*, addressed to the prosecutor in *London*, by whom it was received. It was contended that there was no evidence of any offence having been committed in *Middlesex*, the letter not having been seen by any one there; but Lord *Ellenborough* held, that an offence had been committed in *Middlesex*, and he said that, had the letter never been delivered, the defendant's offence would have been the same. In that case the sending is the gist of the offence, and there need not be any publication. The crime of sending a challenge does not consist in its tendency to a breach of the peace, but has ever been considered as an actual breach of the peace. The act of writing and sending a challenge is therefore criminal, although the challenge never arrives; in like manner as the giving a loaded pistol to a man, and desiring him to shoot another, is criminal though no shot is fired. The act of sending is the crime in the one case and the other; for if in the one case he puts the challenge into his pocket, and in the other the loaded pistol, and changes his purpose, he has the benefit of the *locus penitentiae*, and is not guilty; but if the pistol be actually given to the servant to shoot another, or the challenge actually sent, and before the orders are obeyed the person carrying the pistol or the challenge is intercepted by a magistrate and discloses the facts; can any man doubt that the party sending him might be indicted for a misdemeanor, though his objects were in neither case accomplished? In the crime of libel, how-

(a) 2 *Campb.* 506.

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ever, publication is essential to constitute the offence. If the intention to publish be defeated, the crime is prevented. Every indictment contains the charge of publication, but in the case of a challenge, publication is no part of the charge. The evil design manifested by some overt act of a criminal character, and of immediate danger, though arrested before its final object be accomplished, constitutes a crime, as in the case of delivering the loaded pistol. Publication means the making public; the law, indeed, declares that a communication to one individual is a making public, but neither the law nor common sense can call concealment a publication. It can be no publication, therefore, to put a seal upon a letter and put it into the post; it is an act towards a publication, and if the law defined that act as a crime per se, it might be indicted in the county where it was committed. But that act is in itself a concealment; and to indict a man for a concealment and call it a publication, in order to make a constructive crime, not only violates the principles of common sense, but perverts the plain meaning of words. It is trifling with common sense and common understanding, to say that a man is guilty of publishing a letter by the very act of taking the greatest pains to conceal its contents from every eye but that of the individual whom he intends to see them in another place. He may intend to publish it, and the putting of it into the post may be evidence of that intention, but the intention to do an act which is not done does not make that act; the intention to murder is not murder, nor the intention to publish a publishing. It may be said, however, that the term publication does not necessarily mean a communication of the contents of the instrument, and the publication of a will or

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or of an award may be referred to; there the term publication means no more than the execution or acknowledgment of the particular instrument in the presence of the witness who can identify it. The act of publication in both those cases is confined to the character and identity of the instruments, and therefore need not extend to their contents. The publication, therefore, which the law requires of a will or an award is a communication to others of the nature of the act done, and not of the contents of the instrument; but that term, when applied to a libel, must mean a communication of the contents of the libel, for until that takes place, there can be no tendency to a breach of the peace.

By the rules of pleading, the charge may either be stated upon the record in precise and understood words, or according to their legal effect; that is to say, you may either use a known word, or its legal definition. This is a general rule; there are certain exceptions in cases of a highly penal nature, where the law in favour of life, demands greater strictness; as in an indictment for murder, the word *murder* is indispensable, but in misdemeanor, the offence may be well described by its definition. Now the technical definition of the crime of libel is, that it is an excitement to a breach of the peace by means of a written instrument containing matter injurious to the fame and character of another. Suppose that the indictment omitted all words of publication, and charged the defendant in the language of the definition of the crime of libel: viz. that he in the county of *Leicester*, did unlawfully excite some particular person to commit a breach of the peace by means of a certain written paper, containing the matters following; and then setting forth

forth the libel. Now, would it have been sufficient to prove that the defendant, in the county of *Leicester*, wrote the paper; that he there sealed it, and put it into the post, although the person to whom it was addressed never received it? Clearly not, because that would be no evidence of an excitement in the county of *Leicester*. Excitement is the operation of some act upon the mind of another, and the writing can have no tendency to a breach of the peace, according to the definition, till it begins to operate upon the mind of him whose passions it was intended to provoke. This is the technical definition of the offence of libel. But if we take that which is the more enlarged and correct definition, viz. an injury done to the feelings, the good fame, and the reputation of another, by means of a written instrument, and suppose that the indictment charged that defendant did at a certain place injure the feelings of another by means of certain writing; could it be contended that the merely putting the letter into the post would be any evidence that the feelings or fame of another had been injured? The definition shews that the reputation must be affected, or the mind of the individual wounded, and this must be proved to be done in some particular place; whereas, if the paper has never been seen by that individual, or any other, neither can his fame have been affected, nor his passions inflamed in any place. The crime is not consummated until some person has seen the paper; that is, until publication.

The only question, however, submitted to the jury upon the question of publication was, whether, inasmuch as the letter was never proved to have been sealed, Sir *F. Burdett* might not be presumed to have delivered it open in the county of *Leicester*. Now, that proposition

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involves two parts: first, that Sir *F. Burdett* delivered the letter to some person in the county of *Leicester*; and, secondly, that he delivered it open. There was no evidence to support either part of this proposition. It was proved that the defendant's place of residence was within a few miles of the county of *Rutland*. He was seen riding in the county of *Leicester* on the 22d of *August*, and the following day; but there was no evidence whether the nearest post town was in the county of *Leicester* or of *Rutland*. If the nearest post town were in the latter county, the probability would be that the letter would be put into the post-office in that county; and if that be a publication, it would be a publication in the county of *Rutland*. It was incumbent on the prosecutor, however, to prove that the defendant parted with the possession of the letter in the county of *Leicester*. The second part of the proposition is, that the defendant delivered it open in the county of *Leicester*. Now, there not only was no evidence of that, but it is directly contrary to the evidence; for the letter arrived in *London* at the very time when it would have arrived in due course of post. The presumption, therefore, is, that it came by the post, the ordinary mode of conveying letters. It was inclosed in a cover containing written directions to Mr. *Bickersteth*. It is probable, therefore, that the defendant did not deliver it in person to Mr. *Bickersteth*; but that, when he parted with it, it was under seal, that being the ordinary mode of transmitting letters accompanied with confidential instructions, by the post or by a servant. Taking the case according to probability, the presumption is, that the letter was sent sealed by the post. The other presumption involves the supposition that Mr. *Bickersteth*

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was in *Leicestershire*, of which there was no evidence at all, and is a presumption contrary to the ordinary course of things. It was incumbent on the prosecutor to establish the fact by calling Mr. *Bickersteth*. For no presumption ought to be made in a criminal case.

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Another ground upon which the defendant is entitled to a new trial is, that the learned Judge rejected evidence of the truth of the facts represented in the libel to have taken place at *Manchester*. Now, that evidence ought to have been received; because the effect of it might be to alter wholly the nature of the libel. If the facts were true, the question, whether the publication were a libel or not, would depend upon this, viz. whether the comments were warranted by the facts. If, on the other hand, the facts were false, the very statement of them would constitute a libel.

Another ground of objection to the verdict is, that the learned Judge told the jury that they were to take the law from him as to whether this were a libel or not. Now, by the 32 *Geo. 3. c. 60.* the jury are empowered to give a general verdict upon the whole matter in issue; and, consequently, are to find whether the publication be a libel or not.

Cur. adv. vult.

There being a difference of opinion on the bench, the Judges now delivered their opinions seriatim.

BEST J. (a) This case came on for trial before me at the Spring assizes for the county of *Leicester*. On the

(a) The information being frequently alluded to by the learned judges in delivering their opinions, it may be proper to give the first count:

Leicestershire to wit. Be it remembered that Sir Robert Gifford, knight, Attorney-General of our present sovereign lord the king, who for

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the part of the prosecution it was proved, by Mr. *Brookes*, that the libel in question was delivered to him by

our said lord the king prosecutes in this behalf in his proper person, comes here into the court of our said lord the king, before the king himself at *Westminster*, on *Saturday* next after the morrow of *All Souls*, in this same term ; and for our said lord the king gives the court here to understand and be informed that Sir *F. Burdett*, late of *Westminster* in the county of *Middlesex*, baronet, being a seditious, malicious, and ill-disposed person, and unlawfully and maliciously devising and intending to raise and excite discontent, disaffection, and sedition among the liege subjects of our lord the present king, and amongst the soldiers of our said lord the king, and to move and excite the liege subjects of our said lord the king to hatred and dislike of the government of this realm, and to insinuate and cause it to be believed by the liege subjects of our said lord the king, that divers of the liege subjects of our said lord the king had been inhumanly cut down, maimed, and killed by certain troops of our said lord the king, heretofore, to wit, on the 22d day of *August*, in the 59th year of the reign of our sovereign lord George the Third, by the grace of God, of the united kingdom of *Great Britain* and *Ireland*, King, Defender of the Faith, at *Loughborough*, in the county of *Leicester*, unlawfully and maliciously did compose, write, and publish, and cause to be composed, written, and published, a certain scandalous, malicious, and seditious libel of and concerning the government of this realm, and of and concerning the said troops of our said lord the king, according to the tenor and effect following, (that is to say) " To the electors of *Westminster*, gentlemen, on reading the newspapers this morning, having arrived late yesterday evening, I was filled with shame, grief, and indignation, at the account of the blood spilled at *Manchester* ; this then is the answer of the boroughmongers to the petitioning people, this the practical proof of our standing in no need of reform, these the practical blessings of our glorious boroughmongers' domination, this the use of a standing army in time of peace. It seems our fathers were not such fools as some would make us believe, in opposing the establishment of a standing army, and sending King *William's Dutch* guards out of the country. Yet would to Heaven they had been *Dutchmen*, or *Switzers*, or *Hessians*, or *Hanoverians*, or anything rather than *Englishmen*, who did such deeds. What ! kill men unarmed, unresisting ! and, gracious God, women too, disfigured, maimed, cut down, and trampled on by dragoons ! (meaning the said troops of our said lord the king, and meaning thereby that divers liege subjects of our said lord the king, had been inhumanly cut down, maimed, and killed by the said troops of our said lord the king.) Is this *England* ? This a christian land ? a land of freedom ? Can such things be and pass by us like a summer-cloud unheeded ? forbid it every drop of *English* blood in every vein that does not proclaim its owner bastard. Will the gentlemen of *England* support or wink at such proceedings ? They have a great stake in their country. They hold great estates, and they

by Mr. *Bickersteth*, on the 24th *August*; he did not state where, but I think it fair to presume that it was delivered at the place of his abode in *Middlesex*. Mr. *Brookes*'s memory did not enable him to state distinctly the manner in which the paper came to his possession. He said that the envelope which had covered it was destroyed. He could not say whether it had an address on it or not; but, to the best of his recollection, it was addressed to Mr. *Bickersteth*. Where Mr. *Bickersteth* lived did not appear, nor who he was, further than that

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they are bound in duty and in honour to consider them as retaining fees on the part of their country, for upholding its rights and liberties; surely they will at length awake and find they have other duties to perform besides fattening bullocks and planting cabbages. They never can stand tamely by as lookers-on whilst bloody *Neros* rip open their mother's womb. They must join the general voice, loudly demanding justice and redress, and head public meetings throughout the united kingdom, to put a stop in its commencement to a reign of terror and of blood, to afford consolation as far as it can be afforded, and legal redress to the widows and orphans and mutilated victims of this unparalleled and barbarous outrage. For this purpose I propose that a meeting should be called in *Westminster*, which the gentlemen of the committee will arrange, and whose summons I will hold myself in readiness to attend. Whether the penalty of our meeting will be death by military execution, I know not; but this I know, a man can die but once, and never better than in vindicating the laws and liberties of his country. Excuse this hasty address, I can scarcely tell what I have written. It may be a libel, or the Attorney-General may call it so just as he pleases. When the seven bishops were tried for libel, the army of *James* the Second, then encamped on *Hounslow Heath*, for supporting military power, gave three cheers, on hearing of their acquittal. The king, startled at the noise, asked, 'What's that?' 'Nothing, sir,' was the answer, 'but the soldiers shouting at the acquittal of the seven bishops.' 'Do you call that nothing?' replied the misgiving tyrant, and shortly after abdicated the government. 'Tis true, *James* could not inflict the torture on his soldiers — could not tear the living flesh from their bones with a cat o' nine tails — could not flay them alive. Be this as it may, our duty is to meet, and 'England expects every man to do his duty.' I remain, gentlemen, most truly, and faithfully, your most obedient servant, *F. Burdett, Kirby Park, August 22nd, 1819.*" In contempt of our said lord the king and his laws, to the evil example of all others, and against the peace of our said lord the king, his crown and dignity.

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he was the professional friend of Sir *Francis Burdett*. There was not any seal or trace of a seal on the envelope, nor was there any post-mark either on the envelope or paper. The paper was dated *Kirby Park, August 22d*; and it appeared in evidence that *Kirby Park* was in *Leicestershire*, but at no great distance from the boundaries of the counties of *Leicester* and *Rutland*. It also appeared, from the evidence of a toll-gate keeper near *Kirby Park*, that Sir *Francis Burdett* was seen in *Leicestershire* on the 22d *August*, and again on the following day. There was no evidence of his having left the county of *Leicester* till after the publication of the paper, which took place on the 25th *August*. The paper, to be ready for publication on the 25th, must have been sent from the defendant's seat in *Leicestershire* (which is nearly 100 miles from *London*) on the evening of the 23d (on which day the defendant was seen riding near the toll-gate), or the morning of the 24th. The only words that, according to Mr. *Brookes's* memory, were within the envelope, or any other part of the papers, besides the libel, were "*Forward this to Brookes.*" There was no express direction to him to publish it; and his only reason for thinking the defendant intended that it should be published was, that it was addressed to the electors of *Westminster*. It further appeared that Sir *Francis Burdett*, on Mr. *Brookes* being called upon by Lord *Sidmouth* to deliver up the author, wrote this letter: "*Cottisbrook, August 28, My Lord, hearing your Lordship had applied to the gentleman through whose hands my address to the electors of Westminster was transmitted to the newspapers, to give up the author, and had, at the same time, intimated that a refusal would subject him, as well as the editors of the papers, to a*

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Ministerial prosecution; I take the liberty, in order to save your Lordship further trouble, and also the gentleman above mentioned an unjust prosecution, to inform your Lordship, that I am the author of the address in question; and, moreover, to assure your Lordship, that although penned in a hurry, and under the influence of strongly excited feelings, I can discover nothing in it, on a re-perusal, unbecoming the character of an honest man and an *Englishman*." At the close of the evidence on the part of the prosecution it was contended, that there was no evidence that the libel in question had been published in *Leicestershire*. After hearing the argument, I thought that there was not only such evidence of a publication in *Leicestershire* as I was bound to leave to the jury, but it appeared to me then, and appears to me now, that, unless it received an answer, it was cogent evidence for the jury to find the verdict which they have found. I stated shortly to the learned counsel, that my opinion was, that there was evidence to be laid before the jury, by which I meant them to understand that, if they thought proper, they might offer evidence on the part of the defendant, to rebut the inference which the evidence on the part of the prosecution had raised of a publication in *Leicestershire*. No evidence was offered on the part of the defendant. The case was defended by the Honourable Baronet himself most ably — he said but little on the question of venue; but he contended that it was impossible to impute to him the intent charged in the information. I told the jury that there were two questions for their consideration. The first was, whether there was a publication of the libel in *Leicestershire*; and, secondly, if they should be of opinion that the paper was published in *Leicestershire*, whether the pa-

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per, under the circumstances in which it was published, was a libel. I stated to them the evidence that had been given. I pointed out to them the opportunity the defendant had of answering the evidence for the prosecution by evidence which I thought he might have been prepared to offer. With respect to whether this was a libel, I told the jury that the question, whether it was published with the intention alleged in the information, was peculiarly for their consideration; but I added, that the intention was to be collected from the paper itself, unless the import of the paper were explained by the mode of publication, or any other circumstances. I added, that if it appeared that the contents of the paper were likely to excite sedition and disaffection, the defendant must be presumed to intend that which his act was likely to produce. I told them further, that if they should be of opinion that such was the intention of the defendant, then it was my duty to declare, that, in my opinion, such a paper, published with such an intent, was a libel; leaving it, however, to them (as I was aware at the time that I was bound to do under the act of parliament of the 32 Geo. 3. c. 60. s. 1.) to find whether it was a libel or not. The jury found the defendant guilty. A motion has been since made for a new trial, and I am extremely glad that this case has been fully discussed, and that the defendant has had the advantage of the ablest counsel whom the bar of this or any country could afford. All that talent, industry, and learning could bring forward, has been urged by the gentlemen on each side. I hope, therefore, that we are enabled, by the assistance of the bar, to form an accurate judgment on this case.

Three objections were taken when the rule was moved. The first objection is, that there was no evidence that
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the libel was published in the county of *Leicester*. I have to observe on that point, that if there was any evidence, it was my duty to leave it to the jury, who alone could judge of its weight. The rule that governs a Judge as to evidence, applies equally to the case offered on the part of the defendant, and that in support of the prosecution. It will hardly be contended, that if there was evidence offered on the part of the defendant, a Judge would have a right to take on himself to decide on the effect of the evidence, and to withdraw it from the jury. Were a Judge so to act, he might, with great justice, be charged with usurping the privileges of the jury, and making a criminal trial, not what it is by our law, a trial by jury, but a trial by the Judge. It must be borne in mind, that the question is not whether the evidence was such as ought to have satisfied a jury of the fact of publication in *Leicestershire*, but whether any facts were proved, which raised a presumption of publication in that county. If there were any such facts, I could not deal with them otherwise than I did. I am of opinion that there was evidence in this case, on the part of the prosecution, which raised a strong presumption, that the libel was published in *Leicestershire*; and no attempt having been made to rebut such presumption, it became, in my mind, conclusive proof of that fact. It has been said, that there is to be no presumption in criminal cases. Nothing is so dangerous as stating general abstract principles. We are not to presume without proof. We are not to imagine guilt, where there is no evidence to raise the presumption. But when one or more things are proved, from which our experience enables us to ascertain that another, not proved, must have happened, we presume that it did happen,

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happen, as well in criminal as in civil cases. Nor is it necessary that the fact not proved should be established by irrefragable inference. It is enough, if its existence be highly probable, particularly if the opposite party has it in his power to rebut it by evidence, and yet offers none; for then we have something like an admission that the presumption is just. It has been solemnly decided, that there is no difference between the rules of evidence in civil and criminal cases. If the rules of evidence prescribe the best course to get at truth, they must be and are the same in all cases, and in all civilised countries. There is scarcely a criminal case, from the highest down to the lowest, in which courts of justice do not act upon this principle. Lord *Mansfield*, in the *Douglas* case, gives the reason for this. “As it seldom
“ happens that absolute certainty can be obtained in
“ human affairs, therefore reason and public utility re-
“ quire that Judges and all mankind, in forming their
“ opinions of the truth of facts, should be regulated by
“ the superior number of probabilities on one side and
“ on the other.” In the highest crime known to the law, treason, you act upon presumption. On proof of rebellion, or the endeavour to excite rebellion, you presume an intent to kill the king. In homicide, upon proof of the fact of killing, you presume the malice necessary to constitute murder, and put it on the prisoner, by extracting facts in cross examination, or by direct testimony, to lower his offence to manslaughter, or justifiable homicide. In burglary and highway robbery, if a person is found in possession of the goods recently after the crime, you presume the possessor guilty, unless he can account for the possession. In the case of a libel, which is charged to be written with a particular intent,
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if the libel is calculated to produce the effect charged to be intended, you presume the intent. It therefore appears to me quite absurd, to state that we are not to act upon presumption. Until it pleases Providence to give us means beyond those our present faculties afford, of knowing things done in secret, we must act on presumptive proof, or leave the worst crimes unpunished. I admit, where presumption is attempted to be raised, as to the corpus delicti, that it ought to be strong and cogent; but in a part of the case relating merely to the question of venue, leaving the body of the offence untouched, I would act on as slight grounds of presumption as would satisfy me in the most trifling cause that can be tried in *Westminster Hall*. I shall now state why I think there was a ground raised for presuming that this libel was published in *Leicestershire*. If this presumption had not led us to the truth, it is quite clear it would have received an answer. The defendant came prepared to dispute the publication in *Leicestershire*. I must suppose he came armed with the means of doing so; he had nothing to do but to call Mr. *Bickersteth*, to prove where the paper first saw the light. If it was first delivered from the hand of the defendant in *London* or *Middlesex*, Mr. *Bickersteth* could have had no difficulty in proving the fact. It has been said, that the prosecutor ought to have called him. Did he know that such a person existed? Could he know that he had even touched this paper? Such knowledge could only have been obtained from Mr. *Brookes*, and he was not disposed to communicate it to the prosecutor. The law does not impose impossibilities on parties; it expects, that a man who has the means of knowing who may be witnesses, shall call them. The presumption is, that the
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paper was delivered open in *Leicestershire*. In *Phillipps on Evidence*, p. 152. 4th edit., it is said that the civilians' definition of presumption is "*Præsumptio nihil aliud est quam argumentum verisimile communi sensu perceptum ex eo quod plerumque fit aut fieri intelligitur.*" Presumption means nothing more than, as stated by Lord *Mansfield*, the weighing of probabilities, and deciding, by the powers of common sense, on which side the truth is. Now let us see what are the facts of this case, that raise the presumption of the paper having been delivered open in *Leicestershire*. First, it is clear, that it was written in *Leicestershire*, for it was dated *Kirby Park, Leicestershire*; and it was held, in the case of *The King v. Dr. Hensey (a)*, that the date of a place in a letter, is evidence that it was written there. Then the next fact is, that on the 24th *August* the letter reached *London*. Now, Sir *F. Burdett* is proved, not only on the 22d but on the 23d *August*, to have been in *Leicestershire*, not travelling to *London*, but riding out in the neighbourhood of his own house. It is clear, therefore, that it did not pass from his hands, in *Middlesex*, to those of *Brookes*, but from the hands of *Bickersteth*. This evidence, leaving Sir *F. Burdett* in *Leicestershire*, and shewing a delivery by another person to *Brookes*, raises a presumption that it was sent by him, and not carried by him out of the county. If it was sent out of the county, in what state was it sent? I am to presume a thing always in the state in which it is found, unless I have evidence that, at some previous time, it was in a different state. It was presented to *Brookes* open; why then am I to presume it was ever inclosed? If the envelope had had a

(a) 1 *Burr.* 644.

broken seal, I should have thought that evidence that it had been closed, and that *Bickersteth*, to whom *Brookes* thinks it was addressed, had opened it. But there was no trace of any seal having ever been attached to it. If it came in that envelope it must have been open; and that it came in that envelope, is evident from the address to *Bickersteth* being on it. *Brookes* thought there was no post mark on it. Do not all these facts shew, that it was not sent by the post, but by some private hand (either that of *Bickersteth*, or some other person), and that the words on the outside of the envelope, and which *Brookes* thought was an address to *Bickersteth*, and the words in the inside, "*forward it to Brookes*," were only memoranda, as to what was to be done with the paper when it arrived in *London*. It has, to my mind, nothing of the appearance of a paper sent by the post. If sent by the post, why was it not franked direct to *Mr. Brookes*? If it was thought right to submit it for the first time to *Bickersteth*, in *London*, for his opinion, the envelope would have contained something more of the form of a letter from one gentleman to another, than *forward this to Brookes*. If we act according to the rule laid down by Lord *Mansfield* and the civilians, to judge according to the weight of probabilities, we have then the highest degree of probability on the one side, without any thing to weigh against it on the other, that this paper was delivered either to *Bickersteth*, in *Leicestershire*, or to some other person in the confidence of the defendant; and that he thought it right to trust it to such person open, that he might carry it to *Bickersteth*. On these grounds, I am of opinion that it was not only proper for me (according to the principles on which justice is administered) to leave this case to the jury in the

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the way I did, but that the jury could find no other verdict than that which they have found.

But supposing it to have been sent by the post, my opinion is, that such a sending of it amounted to a publication. It is assumed that publication means a manifestation of the contents. I deny that such is the meaning of the word publication. In no part of the law do I find that it is used in that sense. A man publishes an award, but he does not read it. Again, he publishes a will, but he does not manifest its contents to those to whom he makes the publication; he merely desires the witnesses to take notice that the paper to which they affix their different attestations is his will. So in the case of a libel, publication is nothing more than doing the last act for the accomplishment of the mischief intended by it. The moment a man delivers a libel from his hands his control over it is gone; he has shot his arrow, and it does not depend upon him whether it hits the mark or not. There is an end of the *locus poenitentiae*, his offence is complete, all that depends upon him is consummated, and from that moment, upon every principle of common sense, he is liable to be called upon to answer for his act. Suppose a man wraps up a newspaper and sends it into another county by a boy; who is the publisher? the boy who perhaps cannot read or is ignorant of its contents, or the man who has put it up in the envelope? The boy who carries it is merely an innocent instrument; there can be no other publisher but the person who sent it, and who publishes it when he delivers it to the boy. If the sending of a letter by the post be not a publication in the county from whence it is sent, how is a libeller to be punished who sends his libel by the post to some foreign country for circulation? The libeller will not go to the foreign country that he may be punished there. If the
sending

sending it from *England* be not a publication, (as it is contended at the bar,) can it be insisted, when the libel is completed by publication, that such a libeller can nowhere be punished? A *British* subject might libel with impunity, in a foreign land, his sovereign, his government, or any distinguished individual whose fame extended beyond the limits of his own country; and the foreign disseminator would have this strong appeal to the mercy of his own laws, that being sent to him from a person in *England* he believed the libel to be true. But there is authority for saying that this is a publication. In the case of *The King v. Watson* it was contended, that the post-mark was proof of the letter having been put into the post at *Islington*, and that such putting into the post amounted to a publication. Lord *Ellenborough* held the proof of the publication of the letter insufficient. Why? because there was no proof that there was the post-mark, and that what appeared to be the post-mark might have been a forgery. Now, he would not have said so, if he had thought that putting the letter into the post-office at *Islington* did not amount to a publication. If he had said the putting the letter into the post was not a publication, he would have been inconsistent with himself, a circumstance which the soundness of his judgment would have prevented. For in the case of *The King v. Williams*, which was for sending a challenge in a letter, Lord *Ellenborough* said there was a publication in *Middlesex* by putting it into the post-office there, with intent that it should be delivered at *Windsor*. Lord *Ellenborough* does not say that this is a sufficient sending of a challenge, but a sufficient publication; nor can there be any difference between that case and any other libel. Why are libels against individuals

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viduals prosecuted? because they have a tendency to provoke the party, to whom they are sent, to a breach of the peace. There can be no distinction between a libel sent with an express intent to provoke a breach of the peace, and any other libel on an individual. This case is directly in point to prove that the putting of a letter into the post is a sufficient publication. Had not the civil law been quoted by the counsel for the defendant, I should not have referred to it, although I think it strongly confirmatory of my opinion. The description of a libeller in our indictments seems to me to have been borrowed from the civil law, and I agree that their word *edo* is represented by our word *publish*; but I deny that *edere* means to manifest the contents of a paper. Both in the *Roman* classics and law books it means the act of *delivery*, which precedes the manifestation of the contents; and the subsequent manifestation is expressed by some other term, as *exponere* or *manifestare*. Thus, in *Cicero, De Legibus*, lib. 3. art. 20. he says, “*apud eosdem qui magistratu abierint edant et exponant quid in magistratu gesserint.*” Here, the word “*edant*” means “they uttered,” and the word “*exponant*,” “they exposed to public view what was so uttered.” So, in the civil law, in the *Codex*, lib. 9. tit. 36. we have this passage: “*Si quis famosum libellum ignarus repererit, aut corrumpat priusquam alter inveniat aut nulli confiteatur inventum. Si vero non statim easdem chartulas corruperit vel igne consumpserit, sed earum vim manifestaverit sciat se ut auctorem hujusmodi delicti capitali sententiæ subjugandum.*” Here, the word *ediderit* is not used, but *manifestaverit*. Why? because it constituted no crime for a person who found a paper, and, being ignorant of its contents, delivered it to another. To punish him with death would

would have been a species of cruelty of which the worst of the *Romans* were incapable; but if, instead of destroying it, he *manifested* it, then he was to be considered as the author. The reason I quote this passage is to shew that where “*ediderit*” is used it means a delivery only; but when they intend to express a disclosure of the contents of a paper, they use the word *manifestaverit*; and thus, both according to the civil and the *English* law, whether this paper were delivered open or wrapped up in a hundred envelopes, the delivery was a publication. (a)

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I come

(a) We would venture with great deference to the learned judge, to suggest that possibly it may be found on examination that the word *Edo* is not unfrequently used by the best writers to express a publication in the popular sense of the word. Quintilian, iii. 7., speaking of *Cicero's* publications, uses the phrase, *Editi in competitores, in L. Pisonem, et Clodium, et Curionem libri vituperationem continent*. And *Cicero* himself, in various passages, has employed the same expression in the same sense. As for instance: *Scripti etiam versibus tres libros de temporibus meis, quos jam pridem ad te misissem, si esse edendos putassem*. *Epist. ad Fam. Lib. i. 9. Nec se tenuit quin contra doctores librum etiam ederet*. *Acad. Quæst. iv. 12. Non occultavi (tabulas) non continui domi; sed describi ab omnibus statim librariis, dividi passim, et pervulgari et edi Populo Romano, imperavi*. *Pro. Syll. 15. Ut annales senex emendam atque edam*. *Ad Atticum, ii. 16. Leges autem a me edentur non perfectæ*. *De Legibus, ii. 18.* There is another passage which shews this use of the word in a strong light. It is well known that *Cn. Flavius* first made public the “*actiones*” of the lawyers, which, till then, had been kept secret by them. And *Cicero* thus alludes to it, *Augendæ potentiæ suæ causâ pervulgari artem suam noluerunt: deinde posteaquam est editum expositis a Cn. Flavio primum actionibus, &c.* *De Oratore, i. 41.* In the books of the civil law, the definition of the word *edere* is *Copiam describendi facere, in libello complecti et dare, vel dictare*; which refers to the custom of the plaintiff inscribing in the book of the *Prætor*, his cause of complaint against the defendant, and afterwards of serving his declaration upon the opposite party. *Budæus* inquit “*edere*” *apud juris-consultos est, quod nunc, per scriptum dare, vel per declarationem, dicunt*. These authorities shew, that amongst the *Roman* writers, the word *Edo*, when applied to books, annals, and the like, meant “to make public.” And amongst the civilians, even in its technical use, it implied a particular mode of making public, prescribed by the law, viz. by the inscription in the *Prætor's* book. It undoubtedly also included the delivery of the declaration to the opposite party, which possibly may account for its being

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I come now to another point, viz. the rejection of the evidence of that which was done at *Manchester*, which it was contended ought to have been received for the purpose of explaining the libel. Now in the first place there was no ambiguity to explain. There was no part of the libel that was not intelligible without the aid of evidence. In the next place, it was clear that notwithstanding any thing which might have passed at *Manchester*, many parts of this letter were libellous. Nothing that passed there could explain the allusion to the commencement of a reign of blood and terror in this country, or have applied to what is said in the libel of the soldiers having the living flesh torn from their bones; or to what is perhaps the strongest part of it, the allusion to the abdication of King *James*. The paper would, therefore, at all events, have remained a highly aggravated libel. It is not like the case of the *King v. Horne*. There the defendant did not insist on the truth of the libel, but the indictment having charged him with libelling the king's troops, he endeavoured to shew that those whom he had libelled were not the king's troops; the evidence was admitted only to remove an ambiguity, but there is no obscurity like that in the present case. The defendant in that case offered the evidence, but it failed; and Lord *Mansfield* said, that from the evidence he produced, it appeared clearly that they were the king's troops; his words are, "in this case the defendant gave evidence, but demonstrated that the libel related to the troops acting under the king's authority."

apparently used sometimes in the more restricted sense. In the passage from *Cicero*, quoted by the learned judge, it should be observed, that the words "edant et exponant," are not applied to any book or written composition, and in that case the word may probably admit of a different interpretation to the one here suggested. See *Stephani Thesaurus Lingue Latine*; and *Vicat. Vocabularium Utriusque Juris*.

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Another point on which the motion for a new trial was made was, that I took upon myself to lay down the law to the jury as to the libel, and that since the statute 32 Geo. 3. c. 60. I was not warranted in so doing. I told the jury that they were to consider whether the paper was published with the intent charged in the information; and that if they thought it was published with that intent, I was of opinion that it was a libel. I, however, added, that they were to decide whether they would adopt my opinion. In forming their opinion on the question of libel, I told the jury that they were to consider whether the paper contained a sober address to the reason of mankind, or whether it was an appeal to their passions, calculated to incite them to acts of violence and outrage. If it was of the former description, it was not a libel; if of the latter description, it was. It must not be supposed that the statute of *George the Third* made the question of libel a question of fact. If it had, instead of removing an anomaly, it would have created one. Libel is a question of law, and the judge is the judge of the law in libel as in all other cases, the jury having the power of acting agreeably to his statement of the law or not. All that the statute does is to prevent the question from being left to the jury in the narrow way in which it was left before that time. The jury were then only to find the fact of the publication, and the truth of the innuendoes; for the judges used to tell them that the intent was an inference of law, to be drawn from the paper, with which the jury had nothing to do. The legislature has said that that is not so, but that the whole case is to be left to the jury. But judges are in express terms directed to lay down the law *as in other cases*. In all cases the jury may find a general verdict; they do so in cases of murder and treason, but there the

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judge tells them what is the law, though they may find against him, unless they are satisfied with his opinion. And this is plain from the words of the statute, which, after reciting that doubts had arisen whether on the trial of a libel the jury may give their verdict on the whole matter in issue, directs that "they shall not be required or directed by the judge to find the defendant guilty merely on the proof of the publication, and the sense ascribed to it by the indictment." But the statute proceeds expressly to say, that "on every such trial the judge shall, according to his discretion, give his opinion to the jury on the matter, in like manner as in other criminal cases." That was all that was done on this occasion, and, therefore, I am of opinion that this objection also fails. As to the libel itself, considering it as the production of a man of large fortune, high rank, and extensive influence, where is the person that can make an observation in favour of any part of it? My opinion of the liberty of the press is, that every man ought to be permitted to instruct his fellow subjects; that every man may fearlessly advance any new doctrines, provided he does so with proper respect to the religion and government of the country; that he may point out errors in the measures of public men, but he must not impute criminal conduct to them. The liberty of the press cannot be carried to this extent without violating another equally sacred right; namely, the right of character. This right can only be attacked in a court of justice, where the party attacked has a fair opportunity of defending himself. Where vituperation begins, the liberty of the press ends. This maxim was acted upon by the greatest states of antiquity. In our country, the liberty of the press allows us to persuade men to use their constitutional influence over their re-
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presentatives to obtain in the regular parliamentary manner a redress of real or supposed grievances. But this must be done with temper and moderation, otherwise instead of setting the government in motion for the people, the people may be set in motion against the government. In such a case as this it is fit that the public should know the grounds on which I have acted. Whether I shall persuade others that I have acted right I know not. It is enough for me as an Englishman, to be myself satisfied that I have done so. We have been desired to consider what posterity will think of our judgment. I am not insensible to this consideration, but I value only the good opinion of those who love their country and wish to preserve it in peace. Of their censure I am not afraid. I have acted upon this occasion with the firmness which the times in which we live particularly require, but I trust I have not lost sight of that which ought in all times to guide a judge in this country, where every magistrate is reminded by the oath of his sovereign, that it is his first duty to administer justice in mercy.

HOLROYD J. This is a motion for a new trial which has been made and supported in argument on various grounds with the greatest ability; but after hearing and most attentively considering every thing that has been suggested by the learning and ingenuity which on this occasion we have heard displayed, and the authorities that have been relied upon or discussed, I am of opinion, that the rule for a new trial ought not to be made absolute. The case appears to me to have been sufficiently proved at the trial to warrant the verdict given against the defendant. The proofs are direct and positive, not only that the paper writing charged to be a

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libel was published, but also that Sir *Francis Burdett* was the author of it; that the same was in fact not only composed and written, but that it was also published, by him. I am not at present speaking of any proof either positive or presumptive, of an act of publication by him in *Leicestershire*. I am now speaking of the proof merely of an act of publication by him somewhere. That he was not only the composer and writer, but also that he published it, is directly proved by evidence of his hand-writing to the libel and its envelope, and by the contents of that envelope directing Mr. *Bickersteth* to pass it to Mr. *Brookes*, and further by his letter to Lord *Sidmouth*, in which he not only expressly acknowledges himself to be the author of the paper writing charged to be a libel, but the fact also of *his having sometime before sent it up to town*. So that it is established by direct proof, not only that the paper writing in question was composed and written by him, but also that the locus pœnitentiæ of the writer was passed by his having parted with the possession of it. His own act of sending away the letter, his publishing it to Mr. *Bickersteth*, and the publication of it to Mr. *Brookes* by his own direct authority and order, are decisive on this point. But, if necessary, we have, in addition to the positive proofs of a complete corpus delicti having been committed by the defendant somewhere, by his writing and publishing the letter in question, pregnant proofs, afforded by the very contents of the letter itself, that it was originally composed not with a view of keeping it for any time to himself, for any further consideration whether it should be published or suppressed, but with the intent that it should speedily be published and acted upon. For from its being addressed to the electors of *Westminster*, and from the

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haste in which it appears to have been written, evidently for the purpose of dispatch, it is clear that the defendant intended that it should be acted upon by others in the speedy call of public meetings on the subject. So that the proofs are not only of a writing and publishing by the defendant, but also that the letter was originally written by him with the intent, and for the purpose of its being published, and that that was the sole cause and object of its being written. That it was written at *Kirby Park* in *Leicestershire*, is proved, and indeed is admitted to have been proved by its date. And upon this part of the case the *King v. Hensey*, which was cited, is an authority in point. These circumstances, all of which were proved or admitted at the trial, being taken into consideration, it appears to me, that the jury of the county of *Leicester* had a jurisdiction by law over the offence with which the defendant was charged.

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Writing a libel with the intent and for the purpose of its being published (under circumstances not sufficient in law to justify or excuse the writer for so doing), followed by a publication by the act, or under the authority of the writer, is in my opinion, by the law of *England*, a misdemeanor, and triable in the county where such writing took place, though the publication be in some other county. I do not say whether all those qualities are or are not necessary to be attached to or connected with the act of writing, in order to make it a misdemeanor. It is not necessary at present to consider or give any opinion upon any such case, and still less upon a case where the writing remains confined by the author to his own closet or privacy, or has been obtained from thence, and published without his privity or consent,

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How far the case of the *King v. Beare*, may be borne out or supported in law to that extent, I have not in the present case considered, nor do I mean now to give my opinion upon it. The present case, I think, does not require it, being quite distinguishable; and every thing said by me in this case, will, as I conceive, leave my judgment, as well as that of others, quite unfettered in any such cases as I have last supposed, if unfortunately any such should arise. Where a misdemeanor has been committed by a defendant *by writing and publishing* a libel, *the writing* of such a libel so published, is in my opinion criminal, and liable to be punished, by the law of *England* as a misdemeanor, as well as the publishing of it. The crime in such a case is not confined to the publishing of it alone. The constant form in which the charge is alleged in indictments and informations, shews this. Where the facts of the case are expected to support it, the indictment or information does not confine the offence charged to publishing the libel merely, but alleges the composing or the writing of it *as part of the crime*; and where the party prosecuted has been acquitted of publishing it, and found guilty of writing it, judgment has passed against the defendants, not merely in the *King v. Beare*, but in the subsequent cases of the *King v. Knell*, and the *King v. Carter*, for the preceding parts which the several defendants had taken with respect to the libel, whether it were in printing, composing, or writing them. The charge against this defendant is an aggregate offence; a misdemeanor consisting of different parts, viz. the composing, writing, and publishing; and if so much of that charge be proved to have been committed in the county of *Leicester*, as is in law a misdemeanor, it is perfectly clear

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clear that he might be found guilty of that part alone, and that judgment thereupon must pass against him pro tanto. The composing and writing, with the intent and for the purpose above stated, of a libel proved to have been published by the defendant, is in my opinion, of itself a misdemeanor, in whatever county the publishing of it took place, and is, I think, triable in the county where the libel was composed and written. The jury of that county, I take it to be clear, may inquire into any fact, though in another county, so far at least as tends to prove that to be an offence which has been done in their own county. So far, therefore, at least as the defendant's publishing the libel elsewhere, tends to prove his *composing and writing* of it to be criminal, the jury of the county where it was composed and written, clearly, I think, may inquire of, and take cognizance of it. This is constantly done in the case of overt acts of high treason, and of acts of conspiracy, committed out of the county, in order to establish or confirm the charge of treason or conspiracy within the county.

But it is urged, that if the defendant were found guilty of the composing and writing, and not of the publishing, this information does not contain a sufficient charge of composing and writing, so as to make composing and writing in that case criminal, inasmuch as it does not allege that the defendant wrote it *with intent to publish it*. Now, without considering how far an information in such a case would or would not be sufficient to convict the writer upon it, unless such an allegation, either directly or to that effect, were contained in it, the information does in this case, I think, contain an allegation, not only to that extent and effect, but even further;

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further: for it alleges that the defendant, intending to excite discontent and sedition amongst the King's subjects, and particularly amongst the soldiers, &c. &c. composed, wrote, and published the libel. This allegation of the intent is applicable to each of the acts charged upon the defendant: to the composing and writing, as well as the publishing. And, therefore, as such discontent and sedition could not be excited amongst the soldiers of the King without publishing the libel, the information in effect alleges that the defendant composed and wrote it for the purpose of its being published, in order to effect those further purposes of mischief which could not be accomplished by it, unless by its publication.

But further, I think the jury may inquire into, and take cognizance of those facts which are done out of their county, for the purpose of finding a defendant guilty, not only of so much of the crime as was committed within the county, but also of the remainder of the aggregate charge, in those cases, where so much of the misdemeanor charged as is proved to have been done within their county, is of itself a misdemeanor. If that be so, it would warrant this verdict in its full extent, whether the publication of this libel is deemed to have been in the county of *Leicester* or not. And this is established to be the law, in the cases of conspiracies and nuisances, in both of which the juries do not confine their verdicts of guilty to such criminal acts or consequences as occur in the county where the conspiracy or erection of the nuisance is laid and proved, but extend them to such further acts and consequences of conspiracy and nuisance, as may occur or arise in another county; and judgment and punishment are in
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such cases given and awarded to the full extent of the aggregate offence. The cases of felony have been urged as bearing on the present case, particularly those provided for by the statute of *Philip and Mary*, but those are, I think, distinguished from, and do not apply to the present question.

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It has, however, been further urged, that there ought to be a new trial, because the verdict was found upon the learned Judge's telling the jury that there was evidence before them to shew that the libel was published by the defendant in *Leicestershire*; that it might be presumed to have been delivered by the defendant to Mr. *Bickersteth* there, and even in the state in which it was afterwards delivered to Mr. *Brookes*, namely, open. From what I have stated above, it appears that my opinion must be, that by law the learned Judge need not have gone so far in favour of the defendant as to put it to the jury to consider whether, from the evidence given, they would presume and find that the defendant had published the libel in *Leicestershire*, which would have given him the benefit of an acquittal, in case they had thought the evidence not sufficient for them to make that presumption; because, for the reasons I have above stated, I think the verdict ought to have been the same, whether the defendant had published the libel in that or any other county. It is certainly true, and I most ardently hope that it will ever continue to be the case, that by the law of *England*, as it was urged and admitted in the case of the Seven Bishops, no man is to be convicted of any crime upon mere naked presumption. A light or rash presumption, not arising either necessarily, probably, or reasonably, from the facts proved, cannot avail in law. That is the presumption spoken of

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of in the Seven Bishops' case, which is no more than mere loose conjecture, without sufficient premises really to warrant the conclusion. But crimes of the highest nature, more especially cases of murder, are established, and convictions and executions thereupon frequently take place for guilt most convincingly and conclusively proved, upon presumptive evidence only of the guilt of the party accused; and the well-being and security of society much depend upon the receiving and giving due effect to such proofs. The presumptions arising from these proofs should, no doubt, and most especially in crimes of great magnitude, be duly and carefully weighed. They stand only as proofs of the facts presumed till the contrary be proved, and those presumptions are either weaker or stronger according as the party has, or is reasonably to be supposed to have it in his power to produce other evidence to rebut or to weaken them, in case the fact so presumed be not true; and according as he does or does not produce such contrary evidence. It is established as a general rule of evidence, that in every case the onus probandi lies on the person who wishes to support his case by a particular fact, which lies more peculiarly within his own knowledge, or of which he is supposed to be cognizant. This, indeed, is not allowed to supply the want of necessary proof, whether direct or presumptive, against a defendant of the crime with which he is charged; but when such proof has been given, it is a rule to be applied in considering the weight of the evidence against him, whether direct or presumptive, when it is unopposed, unrebutted, or not weakened by contrary evidence, which it would be in the defendant's power to produce, if the fact directly or presumptively proved were not true. Bearing these considerations

siderations in remembrance, there was, I think, evidence sufficient to be left to the jury from which they might reasonably presume a publication by the defendant in *Leicestershire*. In the case of Sir *Manasseh Lopez*, for bribing a voter of a borough in *Cornwall*; evidence was given that when he was at his seat in *Devonshire* he said, "such a one," (the person whom he was charged to have bribed, and whom he was proved to have bribed, though it did not appear whether the bribery was committed in the county of *Devon*,) "has been with me." It was objected at the trial, that there was not evidence sufficient to shew that the offence was committed in *Devonshire*. Upon that occasion I left it to the jury to consider whether his being there at the time, and that being the county in which the voter was to vote, were not sufficient; and upon that evidence the jury presumed the offence to have been committed in *Devonshire*; it being in the defendant's power, by means of the voter, who was, however, not called by him, to have shewn that the crime was committed out of *Devonshire*, if the fact had been so. I mentioned this circumstance to the Court afterwards, in order that it might be ascertained whether he was rightly convicted or not, and the Court thought it was *prima facie* evidence, and he received judgment.

The presumptions, in the present case, are stronger, and arise, as well from the contents of the libel, and the extrinsic facts proved, as from the want of contrary evidence within the knowledge and power of the defendant, as to facts peculiarly within his own knowledge, and of which he must be supposed to be cognizant, in order to rebut or weaken those presumptions against him. The contents of the libel shew, that it was written in haste,
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and in *Leicestershire*, for the purpose of being speedily acted upon by public meetings elsewhere ; from which it is reasonably to be presumed to have been, as soon as effectually it might be, sent off for its destination, as it must have been delivered by Mr. *Bickersteth* to Mr. *Brookes*, in *Middlesex*, on the 24th *August*, or otherwise it could not have been published in the *British Press* on the 25th. The writer was living in *Leicestershire*, and was proved to be there on the 22d and the day following, within which period of time it was, probably, sent away ; and it is but a reasonable presumption, that it was sent away by him from the place where he was then living ; at least it is so, in default of proof, on his part, of his being out of the county, or of any other evidence to rebut that presumption. The evidence for the crown established both the time and person to whom the prosecutor had traced the libel. How it came to Mr. *Brookes* unsealed, and whether it was originally sealed or not, were matters peculiarly in the knowledge of the defendant, and not of the prosecutor. He knew how and in what state, whether open or sealed, and when he had sent or delivered it to Mr. *Bickersteth*, and might have proved it, or at least he might have shewn, by Mr. *Bickersteth*, in what state it was when he received it. Of these facts the prosecutor could not be supposed to be cognizant ; nor can it be supposed, if the letter had not been parted with by the defendant in *Leicestershire*, and even in an unsealed state, (for it does not appear, that is, there is no proof, that it went by the post ; and if it did, it would no doubt go sealed,) that Mr. *Bickersteth* would not have been called by the defendant to prove the state in which it was received by him. In default of all proof, under such circumstances, to weaken or

or rebut these presumptions, I think the jury were warranted in concluding and finding that it was parted with by the defendant in *Leicestershire*, and that it was then in the same state in which it was delivered to Mr. *Brookes*, there being no proof, either direct or presumptive, of its ever having been in any other state. Indeed, my belief, from the evidence, would be, that it was not sent by the post to Mr. *Bickersteth*, and that he was not in *London* when he received it, but that probably, it was delivered to him by the defendant in *Leicestershire*; for I cannot suggest to myself any reason for his sending the libel, either by the post or otherwise, to Mr. *Bickersteth*, merely to give him the trouble of passing it to Mr. *Brookes* in the *Strand*, instead of sending it at once to Mr. *Brookes* himself.

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But whether it was sent away or parted with by the defendant in *Leicestershire*, *open or sealed*, makes, in my opinion, no difference with respect to the question, whether it was, in point of law, published by him in that county or not, so far as to give the jury of that county jurisdiction over that fact. In *5 Co. Rep. 126. a.*, it is laid down, that a scandalous libel may be published *traditione*, *when* the libel, or any copy of it, is *delivered* over to scandalize the party. So that the mere delivering over or parting with the libel with that intent, is deemed a publishing. It is an uttering of the libel, and that I take to be the sense in which the word *publishing* is used in law. Though in common parlance that word may be confined in its meaning to making the contents known to the public, yet its meaning is not so limited in law. The making of it known to an individual only is, indisputably, in law, a publishing. Lord C. J. *De Grey*, in *Baldwin v. Elphinston*, *2 Black. Rep. 1037.*, states, that a written libel may be published in a letter to

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to a third person, and states two instances from *Rastal's* entries (a) of charges of constructive publications, by delivering letters to *A.* and *B.*, and by fixing them on the door of *St. Paul's Church*. The mere delivery or fixing them, with the intent to scandalize, is itself considered to be a publishing; and in prosecutions for libels, it is never made a matter of enquiry, whether either the witness, who purchased the libel at a defendant's shop, or any other person, read it in the county where it was bought, or even at all, in order to prove the publication of it complete in that county. In such cases the fact of delivering it to the purchaser is alone relied upon as proof of the publication in the county, without any proof of its being read there or elsewhere. In the prosecutions for libels in *London*, when proof was given of their being purchased at *Carlile's* shop, in *Fleet-street*, no enquiry, I believe, ever followed, whether the purchaser had read them within the city of *London* or not; though there is all probability he took them out of the city of *London* and delivered them unread to the solicitor of the Treasury, or some one else in *Lincoln's Inn*. The mere parting with a libel with such an intent, by which a defendant loses his power of control over it, is an uttering; and when the contents of it have thereby become known, if not before, it has become, I think, so far a criminal act, in the county where it is parted with, as to give the jury there a jurisdiction to try the crime of publishing it. As far as depends on the defendant, his crime is there complete; and the act of another person, in reading the composition elsewhere, does not alter his criminality, or the nature of his act, in the county where he parted with it with the criminal intent. In the cases of

(a) *Action on case, 18. a.*

wills and awards, they are constantly made and published, without the contents being made known, even to the witnesses in whose presence they are published. So that the making known the contents is not, in some cases at least, *ex vi termini* essential to the constitution of an act of publishing.

With respect to the objection of the learned Judge's refusing to receive evidence of the truth of the facts alleged, or rather assumed in the libel, there is, I think, not the least doubt upon the point. Although the objection was made, it was not even attempted to be supported by argument at the trial. Whatever might be the result of a due enquiry into those facts elsewhere, it is clear that that was not the proper place or occasion for enquiring into them, nor would the writing be otherwise than, in law, a libel. It assumes, as true, a statement most highly calumnious on individuals, and on the government, merely from a statement in a public newspaper, and without the knowledge, whether it were true or not, to any or to what extent, and indulges in the highest strain of invective, for the purpose of inflaming the public, and raising in their minds the greatest discontent, disaffection, and alarm. That is, in itself, a seditious libel, and the question for the jury was, whether what the defendant had written and published, with the intent stated in the information, was a libel or not, and not to what extent it was so; even supposing that the result of that enquiry would have been any palliation of the libel. With respect to the objections taken to the learned Judge's having given his opinion and directions to the jury, upon the question, whether the writing was a libel or not, it seems to me that he left it to them to consider, whether they would adopt his opinion in that

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respect, or not; and he is expressly directed, by the statute of the 32d of the late king, according to his discretion, to give his opinion and directions to the jury on the matter in issue, in like manner as in other criminal cases. And with respect to the objections to his summing up, I do not, upon an attentive consideration of it, find any reason to disagree with his observations in that respect. For these reasons, I think the rule for a new trial ought to be discharged.

BAYLEY J. In several of the points discussed in the course of the argument, I agree with the rest of the court. I have not the least doubt that the evidence relative to the truth of the transactions, stated in the libel to have taken place at *Manchester*, was properly rejected. I take it to be clear law, that if a libel contain matters imputing to another a crime capable of being tried, you are not at liberty at the time of the trial of the libel, to give evidence of the truth of those imputations. And this is founded on a wise, wholesome, and merciful rule of law; for if a party has committed such an offence he ought to be brought to trial fairly, and without any prejudice previously raised in the minds of the public and the jury. The proper course, therefore, is to institute direct proceedings against him, and not to try the truth of his guilt or innocence behind his back, in a collateral issue to which he is no party. The present libel contains imputations of very high crimes, capable of being tried. It contains a statement that certain persons at *Manchester* had been guilty of murder, and the truth, therefore, of the libel could not be tried without inquiring whether at *Manchester* certain persons had or had not committed murder. It appears, therefore, to me, that evidence upon this point

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was not admissible; and that the case of *Rex v. Horne* is distinguishable, on the ground that there was not in that case an imputation of any crime capable of being tried. In some cases, indeed, it is possible that the falsehood may be of the very essence of the libel. As for instance; suppose a paper were to state that *A.* was on a given day tried at a given place and convicted of perjury: if that be true, it may be no libel, but if false, it is from beginning to end calumnious, and may, no doubt, be the subject of a criminal prosecution. Possibly, therefore, in such a case, evidence of the truth of such a statement by the production of the record, might afford an answer to a prosecution for libel. I also entirely agree that the learned judge did right in intimating to the jury his opinion on the question, whether this was or was not a libel, and in telling them that they were to take the law from him, unless they were satisfied he was wrong. The old rule of law is, *ad quæstionem juris respondent iudices, ad quæstionem facti respondent juratores*; and I take it to be the bounden duty of the judge to lay down the law as it strikes him, and that of the jury to accede to it, unless they have superior knowledge on the subject: and the direction in this case did not take away from the jury the power of acting on their own judgment. Besides, if the judge be mistaken in his view of the law, his mistake may be set right by a motion for a new trial; but if the jury are wrong in their view of it, it is not so easy to rectify their mistake. Upon all these several points I agree with the rest of the court.

But the difficulty which has pressed on my mind, and which, from the beginning of this argument to the conclusion, I have not been able to overcome, arises from

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further: for it alleges that the defendant, intending to excite discontent and sedition amongst the King's subjects, and particularly amongst the soldiers, &c. &c. composed, wrote, and published the libel. This allegation of the intent is applicable to each of the acts charged upon the defendant: to the composing and writing, as well as the publishing. And, therefore, as such discontent and sedition could not be excited amongst the soldiers of the King without publishing the libel, the information in effect alleges that the defendant composed and wrote it for the purpose of its being published, in order to effect those further purposes of mischief which could not be accomplished by it, unless by its publication.

But further, I think the jury may inquire into, and take cognizance of those facts which are done out of their county, for the purpose of finding a defendant guilty, not only of so much of the crime as was committed within the county, but also of the remainder of the aggregate charge, in those cases, where so much of the misdemeanor charged as is proved to have been done within their county, is of itself a misdemeanor. If that be so, it would warrant this verdict in its full extent, whether the publication of this libel is deemed to have been in the county of *Leicester* or not. And this is established to be the law, in the cases of conspiracies and nuisances, in both of which the juries do not confine their verdicts of guilty to such criminal acts or consequences as occur in the county where the conspiracy or erection of the nuisance is laid and proved, but extend them to such further acts and consequences of conspiracy and nuisance, as may occur or arise in another county; and judgment and punishment are in such

such cases given and awarded to the full extent of the aggregate offence. The cases of felony have been urged as bearing on the present case, particularly those provided for by the statute of *Philip and Mary*, but those are, I think, distinguished from, and do not apply to the present question.

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It has, however, been further urged, that there ought to be a new trial, because the verdict was found upon the learned Judge's telling the jury that there was evidence before them to shew that the libel was published by the defendant in *Leicestershire*; that it might be presumed to have been delivered by the defendant to *Mr. Bickersteth* there, and even in the state in which it was afterwards delivered to *Mr. Brookes*, namely, open. From what I have stated above, it appears that my opinion must be, that by law the learned Judge need not have gone so far in favour of the defendant as to put it to the jury to consider whether, from the evidence given, they would presume and find that the defendant had published the libel in *Leicestershire*, which would have given him the benefit of an acquittal, in case they had thought the evidence not sufficient for them to make that presumption; because, for the reasons I have above stated, I think the verdict ought to have been the same, whether the defendant had published the libel in that or any other county. It is certainly true, and I most ardently hope that it will ever continue to be the case, that by the law of *England*, as it was urged and admitted in the case of the Seven Bishops, no man is to be convicted of any crime upon mere naked presumption. A light or rash presumption, not arising either necessarily, probably, or reasonably, from the facts proved, cannot avail in law. That is the

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of in the Seven Bishops' case, which is no more than mere loose conjecture, without sufficient premises really to warrant the conclusion. But crimes of the highest nature, more especially cases of murder, are established, and convictions and executions thereupon frequently take place for guilt most convincingly and conclusively proved, upon presumptive evidence only of the guilt of the party accused; and the well-being and security of society much depend upon the receiving and giving due effect to such proofs. The presumptions arising from these proofs should, no doubt, and most especially in crimes of great magnitude, be duly and carefully weighed. They stand only as proofs of the facts presumed till the contrary be proved, and those presumptions are either weaker or stronger according as the party has, or is reasonably to be supposed to have it in his power to produce other evidence to rebut or to weaken them, in case the fact so presumed be not true; and according as he does or does not produce such contrary evidence. It is established as a general rule of evidence, that in every case the onus probandi lies on the person who wishes to support his case by a particular fact, which lies more peculiarly within his own knowledge, or of which he is supposed to be cognizant. This, indeed, is not allowed to supply the want of necessary proof, whether direct or presumptive, against a defendant of the crime with which he is charged; but when such proof has been given, it is a rule to be applied in considering the weight of the evidence against him, whether direct or presumptive, when it is unopposed, unrebutted, or not weakened by contrary evidence, which it would be in the defendant's power to produce, if the fact directly or presumptively proved were not true. Bearing these considerations

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The presumptions, in the present case, are stronger, and arise, as well from the contents of the libel, and the extrinsic facts proved, as from the want of contrary evidence within the knowledge and power of the defendant, as to facts peculiarly within his own knowledge, and of which he must be supposed to be cognizant, in order to rebut or weaken those presumptions against him. The contents of the libel shew, that it was written in haste,
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or rebut these presumptions, I think the jury were warranted in concluding and finding that it was parted with by the defendant in *Leicestershire*, and that it was then in the same state in which it was delivered to Mr. *Brookes*, there being no proof, either direct or presumptive, of its ever having been in any other state. Indeed, my belief, from the evidence, would be, that it was not sent by the post to Mr. *Bickersteth*, and that he was not in *London* when he received it, but that probably, it was delivered to him by the defendant in *Leicestershire*; for I cannot suggest to myself any reason for his sending the libel, either by the post or otherwise, to Mr. *Bickersteth*, merely to give him the trouble of passing it to Mr. *Brookes* in the *Strand*, instead of sending it at once to Mr. *Brookes* himself.

But whether it was sent away or parted with by the defendant in *Leicestershire*, *open or sealed*, makes, in my opinion, no difference with respect to the question, whether it was, in point of law, published by him in that county or not, so far as to give the jury of that county jurisdiction over that fact. In *5 Co. Rep. 126. a.*, it is laid down, that a scandalous libel may be published traditione, *when* the libel, or any copy of it, is *delivered* over to scandalize the party. So that the mere delivering over or parting with the libel with that intent, is deemed a publishing. It is an uttering of the libel, and that I take to be the sense in which the word *publishing* is used in law. Though in common parlance that word may be confined in its meaning to making the contents known to the public, yet its meaning is not so limited in law. The making of it known to an individual only is, indisputably, in law, a publishing. Lord C. J. *De Grey*, in *Baldwin v. Elphinston*, *2 Black. Rep. 1037.*, states, that a written libel may be published in a letter to

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libel was published, but also that Sir *Francis Burdett* was the author of it; that the same was in fact not only composed and written, but that it was also published, by him. I am not at present speaking of any proof either positive or presumptive, of an act of publication by him in *Leicestershire*. I am now speaking of the proof merely of an act of publication by him somewhere. That he was not only the composer and writer, but also that he published it, is directly proved by evidence of his hand-writing to the libel and its envelope, and by the contents of that envelope directing Mr. *Bickersteth* to pass it to Mr. *Brookes*, and further by his letter to Lord *Sidmouth*, in which he not only expressly acknowledges himself to be the author of the paper writing charged to be a libel, but the fact also of *his having sometime before sent it up to town*. So that it is established by direct proof, not only that the paper writing in question was composed and written by him, but also that the locus poenitentiae of the writer was passed by his having parted with the possession of it. His own act of sending away the letter, his publishing it to Mr. *Bickersteth*, and the publication of it to Mr. *Brookes* by his own direct authority and order, are decisive on this point. But, if necessary, we have, in addition to the positive proofs of a complete corpus delicti having been committed by the defendant somewhere, by his writing and publishing the letter in question, pregnant proofs, afforded by the very contents of the letter itself, that it was originally composed not with a view of keeping it for any time to himself, for any further consideration whether it should be published or suppressed, but with the intent that it should speedily be published and acted upon. For from its being addressed to the electors of *Westminster*, and from the

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haste in which it appears to have been written, evidently for the purpose of dispatch, it is clear that the defendant intended that it should be acted upon by others in the speedy call of public meetings on the subject. So that the proofs are not only of a writing and publishing by the defendant, but also that the letter was originally written by him with the intent, and for the purpose of its being published, and that that was the sole cause and object of its being written. That it was written at *Kirby Park* in *Leicestershire*, is proved, and indeed is admitted to have been proved by its date. And upon this part of the case the *King v. Hensey*, which was cited, is an authority in point. These circumstances, all of which were proved or admitted at the trial, being taken into consideration, it appears to me, that the jury of the county of *Leicester* had a jurisdiction by law over the offence with which the defendant was charged.

Writing a libel with the intent and for the purpose of its being published (under circumstances not sufficient in law to justify or excuse the writer for so doing), followed by a publication by the act, or under the authority of the writer, is in my opinion, by the law of *England*, a misdemeanor, and triable in the county where such writing took place, though the publication be in some other county. I do not say whether all those qualities are or are not necessary to be attached to or connected with the act of writing, in order to make it a misdemeanor. It is not necessary at present to consider or give any opinion upon any such case, and still less upon a case where the writing remains confined by the author to his own closet or privacy, or has been obtained from thence, and published without his privity or consent,

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How far the case of the *King v. Beare*, may be borne out or supported in law to that extent, I have not in the present case considered, nor do I mean now to give my opinion upon it. The present case, I think, does not require it, being quite distinguishable; and every thing said by me in this case, will, as I conceive, leave my judgment, as well as that of others, quite unfettered in any such cases as I have last supposed, if unfortunately any such should arise. Where a misdemeanor has been committed by a defendant *by writing and publishing* a libel, *the writing* of such a libel so published, is in my opinion criminal, and liable to be punished, by the law of *England* as a misdemeanor, as well as the publishing of it. The crime in such a case is not confined to the publishing of it alone. The constant form in which the charge is alleged in indictments and informations, shews this. Where the facts of the case are expected to support it, the indictment or information does not confine the offence charged to publishing the libel merely, but alleges the composing or the writing of it *as part of the crime*; and where the party prosecuted has been acquitted of publishing it, and found guilty of writing it, judgment has passed against the defendants, not merely in the *King v. Beare*, but in the subsequent cases of the *King v. Knell*, and the *King v. Carter*, for the preceding parts which the several defendants had taken with respect to the libel, whether it were in printing, composing, or writing them. The charge against this defendant is an aggregate offence; a misdemeanor consisting of different parts, viz. the composing, writing, and publishing; and if so much of that charge be proved to have been committed in the county of *Leicester*, as is in law a misdemeanor, it is perfectly clear

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was not admissible; and that the case of *Rex v. Horne* is distinguishable, on the ground that there was not in that case an imputation of any crime capable of being tried. In some cases, indeed, it is possible that the falsehood may be of the very essence of the libel. As for instance; suppose a paper were to state that *A.* was on a given day tried at a given place and convicted of perjury: if that be true, it may be no libel, but if false, it is from beginning to end calumnious, and may, no doubt, be the subject of a criminal prosecution. Possibly, therefore, in such a case, evidence of the truth of such a statement by the production of the record, might afford an answer to a prosecution for libel. I also entirely agree that the learned judge did right in intimating to the jury his opinion on the question, whether this was or was not a libel, and in telling them that they were to take the law from him, unless they were satisfied he was wrong. The old rule of law is, *ad quæstionem juris respondent iudices, ad quæstionem facti respondent juratores*; and I take it to be the bounden duty of the judge to lay down the law as it strikes him, and that of the jury to accede to it, unless they have superior knowledge on the subject: and the direction in this case did not take away from the jury the power of acting on their own judgment. Besides, if the judge be mistaken in his view of the law, his mistake may be set right by a motion for a new trial; but if the jury are wrong in their view of it, it is not so easy to rectify their mistake. Upon all these several points I agree with the rest of the court.

But the difficulty which has pressed on my mind, and which, from the beginning of this argument to the conclusion, I have not been able to overcome, arises from

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further: for it alleges that the defendant, intending to excite discontent and sedition amongst the King's subjects, and particularly amongst the soldiers, &c. &c. composed, wrote, and published the libel. This allegation of the intent is applicable to each of the acts charged upon the defendant: to the composing and writing, as well as the publishing. And, therefore, as such discontent and sedition could not be excited amongst the soldiers of the King without publishing the libel, the information in effect alleges that the defendant composed and wrote it for the purpose of its being published, in order to effect those further purposes of mischief which could not be accomplished by it, unless by its publication.

But further, I think the jury may inquire into, and take cognizance of those facts which are done out of their county, for the purpose of finding a defendant guilty, not only of so much of the crime as was committed within the county, but also of the remainder of the aggregate charge, in those cases, where so much of the misdemeanor charged as is proved to have been done within their county, is of itself a misdemeanor. If that be so, it would warrant this verdict in its full extent, whether the publication of this libel is deemed to have been in the county of *Leicester* or not. And this is established to be the law, in the cases of conspiracies and nuisances, in both of which the juries do not confine their verdicts of guilty to such criminal acts or consequences as occur in the county where the conspiracy or erection of the nuisance is laid and proved, but extend them to such further acts and consequences of conspiracy and nuisance, as may occur or arise in another county; and judgment and punishment are in
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such cases given and awarded to the full extent of the aggregate offence. The cases of felony have been urged as bearing on the present case, particularly those provided for by the statute of *Philip and Mary*, but those are, I think, distinguished from, and do not apply to the present question.

It has, however, been further urged, that there ought to be a new trial, because the verdict was found upon the learned Judge's telling the jury that there was evidence before them to shew that the libel was published by the defendant in *Leicestershire*; that it might be presumed to have been delivered by the defendant to Mr. *Bickersteth* there, and even in the state in which it was afterwards delivered to Mr. *Brookes*, namely, open. From what I have stated above, it appears that my opinion must be, that by law the learned Judge need not have gone so far in favour of the defendant as to put it to the jury to consider whether, from the evidence given, they would presume and find that the defendant had published the libel in *Leicestershire*, which would have given him the benefit of an acquittal, in case they had thought the evidence not sufficient for them to make that presumption; because, for the reasons I have above stated, I think the verdict ought to have been the same, whether the defendant had published the libel in that or any other county. It is certainly true, and I most ardently hope that it will ever continue to be the case, that by the law of *England*, as it was urged and admitted in the case of the Seven Bishops, no man is to be convicted of any crime upon mere naked presumption. A light or rash presumption, not arising either necessarily, probably, or reasonably, from the facts proved, cannot avail in law. That is the presumption spoken of

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of in the Seven Bishops' case, which is no more than mere loose conjecture, without sufficient premises really to warrant the conclusion. But crimes of the highest nature, more especially cases of murder, are established, and convictions and executions thereupon frequently take place for guilt most convincingly and conclusively proved, upon presumptive evidence only of the guilt of the party accused; and the well-being and security of society much depend upon the receiving and giving due effect to such proofs. The presumptions arising from these proofs should, no doubt, and most especially in crimes of great magnitude, be duly and carefully weighed. They stand only as proofs of the facts presumed till the contrary be proved, and those presumptions are either weaker or stronger according as the party has, or is reasonably to be supposed to have it in his power to produce other evidence to rebut or to weaken them, in case the fact so presumed be not true; and according as he does or does not produce such contrary evidence. It is established as a general rule of evidence, that in every case the onus probandi lies on the person who wishes to support his case by a particular fact, which lies more peculiarly within his own knowledge, or of which he is supposed to be cognizant. This, indeed, is not allowed to supply the want of necessary proof, whether direct or presumptive, against a defendant of the crime with which he is charged; but when such proof has been given, it is a rule to be applied in considering the weight of the evidence against him, whether direct or presumptive, when it is unopposed, unrebutted, or not weakened by contrary evidence, which it would be in the defendant's power to produce, if the fact directly or presumptively proved were not true. Bearing these considerations

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But whether it was sent away or parted with by the defendant in *Leicestershire*, open or sealed, makes, in my opinion, no difference with respect to the question, whether it was, in point of law, published by him in that county or not, so far as to give the jury of that county jurisdiction over that fact. In 5 *Co. Rep.* 126. a., it is laid down, that a scandalous libel may be published traditione, when the libel, or any copy of it, is delivered over to scandalize the party. So that the mere delivering over or parting with the libel with that intent, is deemed a publishing. It is an uttering of the libel, and that I take to be the sense in which the word *publishing* is used in law. Though in common parlance that word may be confined in its meaning to making the contents known to the public, yet its meaning is not so limited in law. The making of it known to an individual only is, indisputably, in law, a publishing. Lord C. J. *De Grey*, in *Baldwin v. Elphinston*, 2 *Black. Rep.* 1037., states, that a written libel may be published in a letter to

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to a third person, and states two instances from *Rastal's* entries (a) of charges of constructive publications, by delivering letters to *A.* and *B.*, and by fixing them on the door of *St. Paul's Church*. The mere delivery or fixing them, with the intent to scandalize, is itself considered to be a publishing; and in prosecutions for libels, it is never made a matter of enquiry, whether either the witness, who purchased the libel at a defendant's shop, or any other person, read it in the county where it was bought, or even at all, in order to prove the publication of it complete in that county. In such cases the fact of delivering it to the purchaser is alone relied upon as proof of the publication in the county, without any proof of its being read there or elsewhere. In the prosecutions for libels in *London*, when proof was given of their being purchased at *Carlile's* shop, in *Fleet-street*, no enquiry, I believe, ever followed, whether the purchaser had read them within the city of *London* or not; though there is all probability he took them out of the city of *London* and delivered them unread to the solicitor of the Treasury, or some one else in *Lincoln's Inn*. The mere parting with a libel with such an intent, by which a defendant loses his power of control over it, is an uttering; and when the contents of it have thereby become known, if not before, it has become, I think, so far a criminal act, in the county where it is parted with, as to give the jury there a jurisdiction to try the crime of publishing it. As far as depends on the defendant, his crime is there complete; and the act of another person, in reading the composition elsewhere, does not alter his criminality, or the nature of his act, in the county where he parted with it with the criminal intent. In the cases of

(a) *Action on case, 15. a.*

wills and awards, they are constantly made and published, without the contents being made known, even to the witnesses in whose presence they are published. So that the making known the contents is not, in some cases at least, *ex vi termini* essential to the constitution of an act of publishing.

With respect to the objection of the learned Judge's refusing to receive evidence of the truth of the facts alleged, or rather assumed in the libel, there is, I think, not the least doubt upon the point. Although the objection was made, it was not even attempted to be supported by argument at the trial. Whatever might be the result of a due enquiry into those facts elsewhere, it is clear that that was not the proper place or occasion for enquiring into them, nor would the writing be otherwise than, in law, a libel. It assumes, as true, a statement most highly calumnious on individuals, and on the government, merely from a statement in a public newspaper, and without the knowledge, whether it were true or not, to any or to what extent, and indulges in the highest strain of invective, for the purpose of inflaming the public, and raising in their minds the greatest discontent, disaffection, and alarm. That is, in itself, a seditious libel, and the question for the jury was, whether what the defendant had written and published, with the intent stated in the information, was a libel or not, and not to what extent it was so; even supposing that the result of that enquiry would have been any palliation of the libel. With respect to the objections taken to the learned Judge's having given his opinion and directions to the jury, upon the question, whether the writing was a libel or not, it seems to me that he left it to them to consider, whether they would adopt his opinion in that

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respect, or not; and he is expressly directed, by the statute of the 32d of the late king, according to his discretion, to give his opinion and directions to the jury on the matter in issue, in like manner as in other criminal cases. And with respect to the objections to his summing up, I do not, upon an attentive consideration of it, find any reason to disagree with his observations in that respect. For these reasons, I think the rule for a new trial ought to be discharged.

BAYLEY J. In several of the points discussed in the course of the argument, I agree with the rest of the court. I have not the least doubt that the evidence relative to the truth of the transactions, stated in the libel to have taken place at *Manchester*, was properly rejected. I take it to be clear law, that if a libel contain matters imputing to another a crime capable of being tried, you are not at liberty at the time of the trial of the libel, to give evidence of the truth of those imputations. And this is founded on a wise, wholesome, and merciful rule of law; for if a party has committed such an offence he ought to be brought to trial fairly, and without any prejudice previously raised in the minds of the public and the jury. The proper course, therefore, is to institute direct proceedings against him, and not to try the truth of his guilt or innocence behind his back, in a collateral issue to which he is no party. The present libel contains imputations of very high crimes, capable of being tried. It contains a statement that certain persons at *Manchester* had been guilty of murder, and the truth, therefore, of the libel could not be tried without inquiring whether at *Manchester* certain persons had or had not committed murder. It appears, therefore, to me, that evidence upon this point
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was not admissible; and that the case of *Rex v. Horne* is distinguishable, on the ground that there was not in that case an imputation of any crime capable of being tried. In some cases, indeed, it is possible that the falsehood may be of the very essence of the libel. As for instance; suppose a paper were to state that *A.* was on a given day tried at a given place and convicted of perjury: if that be true, it may be no libel, but if false, it is from beginning to end calumnious, and may, no doubt, be the subject of a criminal prosecution. Possibly, therefore, in such a case, evidence of the truth of such a statement by the production of the record, might afford an answer to a prosecution for libel. I also entirely agree that the learned judge did right in intimating to the jury his opinion on the question, whether this was or was not a libel, and in telling them that they were to take the law from him, unless they were satisfied he was wrong. The old rule of law is, *ad quæstionem juris respondent iudices, ad quæstionem facti respondent juratores*; and I take it to be the bounden duty of the judge to lay down the law as it strikes him, and that of the jury to accede to it, unless they have superior knowledge on the subject: and the direction in this case did not take away from the jury the power of acting on their own judgment. Besides, if the judge be mistaken in his view of the law, his mistake may be set right by a motion for a new trial; but if the jury are wrong in their view of it, it is not so easy to rectify their mistake. Upon all these several points I agree with the rest of the court.

But the difficulty which has pressed on my mind, and which, from the beginning of this argument to the conclusion, I have not been able to overcome, arises from

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the direction of the learned judge to the jury, as to the publication in the county of *Leicester*. This is, undoubtedly, a technical objection, and does not interfere with the merits of the case. But whether technical or not, it seems to me to be a valid objection; and I should desert my duty if I did not, by avowing my opinion, give to the defendant the full benefit which may arise from it, whatever that opinion may be. The facts proved at the trial were in substance these: the libel was written at *Kirby Park*, in *Leicestershire*; as appeared from the date, which is *Kirby Park*, the 22d *August*, and from the circumstance of the defendant being seen on that and the subsequent day, riding near his residence in that county. By a subsequent letter to Lord *Sidmouth*, the defendant avowed himself the author, and that he had transmitted the paper to *London*. It appeared also, that on the 24th of *August* Mr. *Brookes* received it in *London* from Mr. *Bickersteth*, and that he received at the same time an envelope, in which the libel was contained, and in which was a direction from the defendant to Mr. *Bickersteth*, to pass the enclosure to Mr. *Brookes*. It did not appear whether the envelope had been sealed, and there was no evidence of the manner in which it had reached Mr. *Bickersteth*, whether by a personal delivery or otherwise; he himself was not called as a witness, nor was there any evidence to shew that he was resident or had been in *Leicestershire* about that time. An objection was taken at the trial, that there was no evidence of any publication in *Leicestershire*, which, after argument, the learned judge overruled, and when he summed up to the jury, he intimated to them, that they might presume that the enclosed paper was delivered open to Mr. *Bickersteth*, in the county of *Leicester*. Now, my objection to that

that direction is this, that the judge left it to the jury without sufficient premises to warrant them in presuming an open delivery to Mr. *Bickersteth*; and that it proposed to their consideration no other species of delivery by the defendant. As far as I can judge, the evidence given furnished to them no ground for such a presumption. No one can doubt that presumptions may be made in criminal as well as in civil cases. It is constantly the practice to act upon them, and I apprehend that more than one half of the persons convicted of crimes, are convicted on presumptive evidence. If a theft has been committed, and shortly afterwards, the property is found in the possession of a person who can give no account of it, it is presumed that he is the thief, and so, in other criminal cases; but the question always is, whether there are sufficient premises to warrant the presumption, and those premises seem to me, in this case, to be wanting. In order to warrant a presumption a *prima facie* case must, at least, be made out. Now was such a *prima facie* case made out here? The proposition to be established consists of two parts: first, that a paper, written in *Leicestershire* and afterwards found in *London*, in the hands of Mr. *Bickersteth*, was delivered personally to him in *Leicestershire*; and, secondly, that it was delivered to him open. It is incumbent on the prosecutor to make out a *prima facie* case upon the affirmative of each of those points. Now, does he advance any evidence as to either? Does it follow, that because Mr. *Bickersteth* has it in *London*, that he received it personally in *Leicestershire*? Does it follow, because he has it open in *London*, that it was not sent to him in a parcel or in a sealed letter? Suppose this to be the only proposition to be established, and that

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the prosecutor had gone with this evidence before a grand jury, could the grand jury find the bill? I apprehend they would have expected some additional facts to be produced, and that unless Mr. *Bickersteth* had been called as a witness on the part of the crown, they would not have found a bill on the publication in *Leicestershire*; they might have said, "Here is clearly a publication in *Middlesex*, for which a bill will no doubt be found by the grand jury of that county; but it is altogether doubtful whether any publication took place in *Leicestershire* or not." Now, if a grand jury could not find a bill upon such evidence, can the petit jury be asked to convict upon it? Again, suppose a feigned issue upon these two questions; could the plaintiff ask for a verdict upon such evidence as this? Upon whom does the onus probandi lie? Is the plaintiff to say to the jury, "if the defendant does not give you any evidence you are to presume that this paper was delivered to Mr. *Bickersteth* and open?" I apprehend, that if he did say so, it would be impossible for the jury to come to such a conclusion. I try this case by these tests, because, although this is a criminal information filed by the Attorney-General, yet he will not file an information in any particular county, unless he is convinced that there is such evidence as ought to satisfy a grand jury; and he never would, I apprehend, have filed this information, unless he had thought that there was a *prima facie* case of publication in *Leicestershire*. I agree, that where a matter is peculiarly within the knowledge of one party, the onus probandi may be shifted, and his neglect to give the evidence may furnish ground for a presumption against him. But here the matter does not lie

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peculiarly within the knowledge of the defendant. Mr. *Bickersteth* knew as well as the defendant the circumstances of the case, and the case on the part of the prosecution shews it. Then the question is, whether it was sufficient to leave the case without calling him as a witness. Is the prosecutor to say "Here is a person who can tell you to an absolute certainty the fact as to the delivery, but I will not call him, and yet I will desire you to presume a personal and open delivery to him. I ask you to act upon presumption which may mislead, when the power of supplying you with certainty is within my reach." If, indeed, there was any evidence to go to the jury, they had a right to come to a conclusion. But my opinion is, that there was no evidence, and that it ought not to have been submitted to their consideration at all. My learned brother told the jury most properly, that if he were wrong in his view of the case, the defendant would have the benefit of having his mistake corrected. And it does seem to me upon a careful review of the case, that there was a mistake in considering that in the absence of Mr. *Bickersteth*, there was any evidence to go to the jury. If, in the course of the cause, it had appeared that Mr. *Bickersteth* had been in *Leicestershire*, or that the defendant or any of his agents had been instrumental in concealing from the prosecution the mode in which the paper had come to the hands of Mr. *Brookes*, it might, perhaps, have varied the case, and given some ground for such a presumption. But there is no such proof, nor even that any application to that effect was ever made to Mr. *Brookes*; it is not even shewn that Mr. *Bickersteth* was not present in court at the time of the trial, and capable of being examined as a witness. In the absence of all this proof, it seems to me that there was no ground on which the jury could

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put the presumption either the one way or the other. If this case had gone before a grand jury, Mr. *Brookes* might have been compelled to say from whom he received the paper, and the link of the chain which seems at present wanting, might have been easily filled up. But it seems to me that as the case at present stands, the jury were desired to make a presumption without having sufficient premises, and that if they did draw that presumption they acted not upon justifiable inference, but upon unwarrantable conjecture. Upon these grounds the difficulty which I have entertained in this case is principally founded.

But it is said, that even if the verdict cannot be supported on this ground, yet there is evidence from which a jury might have presumed, and must have presumed, that this libel was delivered for the purpose of publication, either to a servant, or at the post office, in the county of *Leicester*. If the jury *must have presumed that*, I should pause before I said there ought to be a new trial. If it stands only that they might have done so, then it is for them to draw the conclusion. If the case has been put to them on a ground which cannot be supported, we must use great caution in proceeding upon the idea that there was another ground on which they might have acted. The jury ought never to invade the province of the judge as to questions of law, but it is for them alone to come to a conclusion on questions of fact. If the court draw the conclusion, they invade the province of the jury. Upon this evidence, I cannot tell where Sir *Francis Burdett* parted with the letter, what distance his residence is from the post office, into what post office it was put, and whether he carried it himself, or sent it by a servant. These are points on which I have no means of forming a judgment. It therefore
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seems to me that there is no foundation on which without infringing on the rights and privileges of the jury, we could come to the conclusion, that although the paper was delivered to Mr. *Brookes* in *London*, it must have been parted with by Sir *Francis Burdett* in *Leicestershire*. That question has not been put to the jury, and till that has taken place, it is not for me to put such a construction upon the facts. But suppose that it was delivered by Sir *Francis Burdett* in *Leicestershire*; then the question arises, in what state was it delivered? Was it open or sealed? If sealed, does a close delivery amount in law to a publication? That turns on the meaning of the word publication; I do not mean to give an opinion whether a close delivery is or is not a publication, but I think, that if a judge tells a jury that a close delivery, a mere traditio, in a sealed state (without an opportunity of seeing the contents) is a publication, a defendant should have the right to claim a special verdict on that point, in order that he may have the opinion of a court of error on the subject. The word "published," is equivocal, and may admit of different meanings according to the subject-matter to which it is applied. In the case of libel, which is criminal only in respect of its contents, it may mean only a communication to others, or an affording an opportunity to others of seeing the contents. There does not appear to me to be any authority so direct on this point as to take from the defendant the right to have a writ of error in order to canvass this question. Of the authority of Lord *Ellenborough*, nobody thinks higher than I do. He was a man of a most powerful and vigorous mind; but I may say, that even his opinions at nisi prius were not always right; and I will add of him, that I never met with a man who was more ready in the best
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part of his life to recede from his own opinion so delivered, and to yield to that of others. The case of the *King v. Watson* did not give him such an opportunity. The evidence was of the post mark at *Islington*, to shew a publication in *Middlesex*; the case subsequently failed, and the point was not afterwards considered. The case of the *King v. Williams*, was for sending a challenge, and though the word publication was used, yet the act charged was an act of sending, and no doubt the putting a letter into the post was proof of that fact. There was another case of *Metcalf v. Markham*, cited in argument, which, however, seems to me to be no authority on this point, because there the sending the letter from *Hull*, was clearly part of the cause of action, and material evidence in the case. Another case to which I adverted in the course of the argument, is that of the *King v. Collicott*; there the prisoner was indicted for uttering forged stamps in *Middlesex*, a crime which has been considered as analogous to the present case. He lived in *Middlesex*, and sent the forged stamps by his servant in a parcel to *London*, that they might be forwarded from thence by a carrier to *Bath*; the judges considered the question, and seven were of opinion that he was guilty of uttering in *Middlesex*, but five others, whose names were entitled to great respect, very considerable lawyers, were of a contrary opinion. The result was, as might be expected, that no proceedings were taken on the verdict; but he was afterwards prosecuted for another offence in *London*. These authorities seem to warrant me in this observation, that the case of delivering a letter sealed, is not so clear a case of publication as to exclude a defendant from the right to have the fact found specially; and it seems to me, that
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by the course taken, the defendant has been deprived of this opportunity, for the question of a delivery sealed, never was presented for the consideration of the jury.

But it has further been argued, that whether there was a publication in *Leicestershire* or not, still this verdict ought to stand, for that the composing, writing, and publishing, constitute one entire offence, and that if part thereof be in one county and part in another, an indictment may be supported in either; and I was for a considerable time of that opinion, and had at one period consented, upon that ground, to refuse the rule. Upon the discussion, however, which has since taken place, and upon further consideration, I am by no means satisfied that this is so clear a point as to warrant us in concluding the defendant from having it put upon the record. I consider the evidence as establishing clearly that the defendant composed and wrote in the county of *Leicester*, and published in the county of *Middlesex*; and I think it impossible to deny but that he composed, wrote, and published with the intent charged in the information. And even now, if the Attorney-General would consent to enter the verdict specially in that way, I should be against the rule for a new trial. Upon the best consideration, however, which I can give to the authorities, I am of opinion that the whole offence, the whole *corpus delicti*, must be in one and the same county; that there is no distinction in this respect between felonies and misdemeanors; and that, though the jury may enquire into collateral facts, or facts of inducement prior to the crime, or facts resulting from the crime, in another county, they are wholly confined to the county for what constitutes the offence itself. *Hale's Summary*, p. 203. says, "Regularly the grand jury can enquire

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enquire of nothing but what arises within the body of the county for which they are returned;" but he states as an exception, "for a nuisance in one county to another, a jury of the county where the nuisance is committed may indict it." Now this mode of putting the case of nuisance clearly implies that the rule extended to misdemeanors as well as felonies, and that such special case of misdemeanor was an exception to it. And why is it an exception? Because the whole body of the offence is in the county where the nuisance is committed; the jury there find in their own county a wrongful act, calculated to do mischief; and all they enquire out of their own county is into the consequences of such wrongful act. Lord *Hale* says (a), "The grand jury are sworn *ad inquirendum pro corpore comitatus*; and, therefore, regularly they cannot enquire of a fact done out of their county, for which they are sworn, unless specially enabled by act of parliament, but only in some special cases;" and in p. 164. he says, "If *A.* by reason of the tenure of lands in the county of *B.*, be bound to repair a bridge in the county of *C.*, he may be indicted in the county of *C.*" Now this, again, is a special exception in case of misdemeanor. The whole *corpus delicti* there is the neglect to repair, which is in *C.*, and the ground of his obligation is only evidence to prove his guilt in *C.* Lord *Hale* cites 5 *H.* 7. 3., and 3 *Ed.* 3. Assise 440., in support of this position. In 2 *Hawk.* c. 25. s. 34. it is stated thus: "It seems to be generally agreed at this day, that by the common law no grand jurors can indict any offence whatsoever, which does not arise within the limits of the precinct for which they are returned." And in s. 37. "And

(a) 2 *Hale* P. C. 163.

it seems, by the common law, if a fact done in one county prove a nuisance to another, it may be indicted in either county," still putting this (though a case of misdemeanor) as a case of special exception; for which he cites *Summ.* 203. *Assize* 446. and 19 *Assize*, 6. Sir *W. Blackstone*, vol. 4. p. 302. lays it down thus: "The grand jury are sworn to enquire only for the body of the county, pro corpore comitatus; and, therefore, they cannot regularly enquire of a fact done out of the county for which they are sworn, unless particularly enabled by act of parliament." And in page 305. after an enumeration of certain exceptions, he says, "but in general, all offences must be indicted, as well as tried, in the county where the fact is committed." These authorities are all general, without distinction between felonies and misdemeanors, and seem to shew, that though the evidence need not be confined to the county, the offence must. We have an instance of this in the case of bigamy; where the first marriage, which must be proved, may be proved to have taken place either in or out of the county where the offence is tried. But what is the whole offence? It is the second marriage, and the second marriage only which is the corpus delicti, and that must be proved within the county, (unless the indictment is in the county where the prisoner was apprehended, which is specially provided for) and then the jury have jurisdiction to enquire into the other facts of the case. *Danby's case*, 2 *R.* 3. *pl.* 10., which has been cited, seems to me to fall within the same rule. There it appeared that the original writ was erased in *London* by *Mundres*, but the other erasures which completed the offence, were done in *Middlesex*, by *Danby* and three others. And the prisoners, in consequence of this, were not tried for the felony, but were afterwards separately convicted in *London* and *Middlesex*

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Middlesex of the misdemeanor. But there each alteration was a complete common law misdemeanor; each offender was indicted in the county in which the whole of his misdemeanor was committed, and this case, therefore, is not an authority to shew that a misdemeanor commenced in *London* and consummated in *Middlesex*, could be tried in either.

Upon these grounds, I think, this, at least, so far a questionable point, that if the publication in *Leicestershire* cannot be supported, the ground which I have last considered is not sufficient to support the verdict in its present shape, and that there ought to be a new trial, unless the Attorney-General consents to a special verdict. The only remaining question is, whether, if the verdict be narrowed to the composing and writing, and the publishing and causing to be published be negatived, composing and writing constitute an offence. But the case seems hardly ripe for discussing that question. If the verdict be so narrowed, I shall readily give my opinion upon the question; but, till then, it is unnecessary. Upon the whole, therefore, I am of opinion that the verdict, as at present found, ought not to stand; and that, if it is not confined to composing and writing in *Leicestershire*, and publishing in *Middlesex*, there ought to be a new trial.

ABBOTT C. J. I am of opinion, that the rule for a new trial in this cause ought to be discharged. The case has been argued at very great length on the part of the defendant, and many topics have been addressed to the Court, some of a general nature, and others more particularly applicable to the case itself. It has been contended, that the whole crime of libel consists in the publication alone, and that the author, or writer, is in

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no degree criminal if his composition be not published. I intimated more than once, in the progress of the argument, that the decision of this point was, in my opinion, immaterial to the present case, because this is the case of a libel actually published by the authority and procurement of its author. I shall, therefore, abstain from giving any decided opinion upon this point, but I cannot forbear observing, that many of the passages quoted in support of the proposition, from the text of the civil law being expressed in the disjunctive, appear to me to be authorities rather against than in favour of the point for which they were adduced. The composition of a treasonable paper intended for publication has, on more than one occasion, been held an overt act of high treason, although the actual publication had been intercepted or prevented, and I have heard nothing upon the present occasion to convince my mind that one who composes or writes a libel with intent to defame, may not, under any circumstances, be punished, if the libel be not published. In any case in which this question may arise, the particular circumstances of the case will become fit matter for consideration at the trial.

The case of *The King v. Beare* came before the Court after verdict. There is no very clear and satisfactory report of it, and I will only say of it, at present, that I have no doubt that Lord *Holt* considered the criminal intention charged in the indictment as not negatived by the verdict, and understood the word *only* to be confined to the acts done. It is true, that in cases of libel a publication has been generally proved, and the trial has been had in the county where publication took place. The place of publication is rarely a matter of doubt, the place of the writing or composition is often unknown, and as most of the cases of libel have been cases of publication,

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lication, Judges and other persons, speaking of the crime of libel, generally, and without any thing requiring a distinction between the writing and publishing, may not unreasonably use expressions applicable to published slander.

It was further contended, that the word publication denotes an actual communication of the contents of the writing by the publisher to some other person, and we were referred to dictionaries for the sense of the word publication. But in the law, as indeed in other sciences and arts, some words are used in a peculiar sense, differing in a certain degree from their popular meaning. Thus, in the language of the law, we speak of the publication of a will, and the publication of an award, without meaning to denote by that word any communication of the contents of those instruments, and meaning only a declaration by the testator or arbitrator, in the presence of witnesses, that the instrument is his testament or award. In like manner the publication of a libel does not, in my opinion, mean an actual communication of the contents of the paper. Lord *Coke* says, a libel may be published traditione, by delivery; and this is adopted by Lord Chief Baron *Comyns* in his *Digest*, and is conformable to the civil law, wherein we find the word *edidit* used as applicable to this subject. Actual communication of the contents, as by singing or reading, is indeed one mode of publication; but it is not the only mode, nor the usual mode; the usual mode is by delivery of the paper, either by way of sale or otherwise; and upon proof of the purchase of a newspaper or pamphlet in *Fleet-street*, no one ever thought of asking whether the purchaser or other person read the paper or pamphlet in *London* or elsewhere.

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I shall now proceed to advert to the topics more particularly applicable to the present case. In the first place it was contended, that there was not, in this case, as it was said there ought to have been, any evidence of publication in the county of *Leicester*; and the manner in which this point was put to the jury, by my learned Brother, at the trial, was made the ground of much objection. It was said, that the jury were directed to presume a publication in *Leicestershire*, without any sufficient ground; but, upon an attentive consideration, I am of opinion, that all that was done upon this subject, was well warranted by the evidence adduced at the trial. A presumption of any fact is, properly, an inferring of that fact from other facts that are known; it is an act of reasoning; and much of human knowledge on all subjects is derived from this source. A fact must not be inferred without premises that will warrant the inference; but if no fact could thus be ascertained, by inference in a court of law, very few offenders could be brought to punishment. In a great portion of trials, as they occur in practice, no direct proof that the party accused actually committed the crime, is or can be given; the man who is charged with theft, is rarely seen to break the house or take the goods; and, in cases of murder, it rarely happens that the eye of any witness sees the fatal blow struck or the poisonous ingredients poured into the cup. In drawing an inference or conclusion from facts proved, regard must always be had to the nature of the particular case, and the facility that appears to be afforded, either of explanation or contradiction. No person is to be required to explain or contradict, until enough has been proved to warrant a reasonable and just conclusion against

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him, in the absence of explanation or contradiction ; but when such proof has been given, and the nature of the case is such as to admit of explanation or contradiction, if the conclusion to which the proof tends be untrue, and the accused offers no explanation or contradiction ; can human reason do otherwise than adopt the conclusion to which the proof tends ? The premises may lead more or less strongly to the conclusion, and care must be taken not to draw the conclusion hastily ; but in matters that regard the conduct of men, the certainty of mathematical demonstration cannot be required or expected ; and it is one of the peculiar advantages of our jurisprudence, that the conclusion is to be drawn by the unanimous judgment and conscience of twelve men, conversant with the affairs and business of life, and who know, that, where reasonable doubt is entertained, it is their duty to acquit ; and not of one or more lawyers, whose habits might be suspected of leading them to the indulgence of too much subtilty and refinement. I have thought it right to premise these general observations, before I consider the particulars of the evidence in the present case, and I must also first take notice of a topic that was urged on this head, by one or more of the learned gentlemen who have argued for the defendant. It was said, and truly said, that guilt and crime are never to be presumed ; and the cases of supposed murder, mentioned by Lord *Hale*, and which have since operated as a caution to all Judges, were quoted on this occasion. But the cases are wholly different. In those cases, there was no actual proof of the death of the person supposed to have been slain, and, consequently, no proof that the crime of murder had been committed. The *corpus delicti* was
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not established. In this case, the crime, so far as it consists in the composing and publishing the paper, was proved beyond all contradiction; the paper was written by the defendant, and came to the hands of Mr. *Brookes* by the defendant's authority and procurement, not as a private and confidential communication, but for insertion in the public newspapers; and the question is not whether there was any publication, but in what county the publication shall be deemed to have taken place; a question arising entirely out of the locality of the jurisdiction of this country. If the prosecutor has mistaken the county in which the offence is charged, the defendant is entitled to avail himself of that mistake; and I have as little inclination as authority to deprive him of his privilege; and this brings me to the particulars of the evidence.

The information is laid in *Leicestershire*, and it charges that the defendant, in *Leicestershire*, composed, wrote, and published, and caused and procured to be composed, written, and published, a libellous paper. In support of this allegation, a paper was produced at the trial, in the hand-writing of the defendant, dated the 22d of *August*, at *Kirby Park*; a letter was also produced, written by the defendant to Lord *Sidmouth*, in which the defendant acknowledged that he was the author of this paper, and had transmitted it to town for insertion in the newspapers. *Kirby Park* is a mansion-house and residence of the defendant, a gentleman of fortune, in *Leicestershire*; the defendant was seen riding on horseback, in *Leicestershire*, on the 22d of *August*, and also on the following day. From the contents of the paper, it appears to have been composed in some haste, in consequence of something which the defendant had just read in a newspaper. There is, therefore,

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abundant proof, that the matter was composed and written by the defendant, in *Leicestershire* ; nor is that fact denied ; and if so, the paper must have been in his hands or power in *Leicestershire*, when the writing was finished. It was further proved, that on the 23d or 24th of *August* this paper was delivered to Mr. *Brookes*, in *Middlesex*. Mr. *Brookes*, a friend of the defendant, was the witness who proved this ; and the further account that he gave of the matter was, that the paper was brought to him by a Mr. *Bickersteth*, in an envelope, which he had mislaid, and which had no seal ; he did not know how it was directed, but he believed that it might be directed to Mr. *Bickersteth* ; and he said that it had the words “ Pass this to Mr. *Brookes*,” or something to that import. It is to be observed, that this witness would not take upon himself to say that the envelope was directed : he only said he believed it might be ; nor did he say whether the words were written within or without the envelope. Mr. *Bickersteth* was not called by the prosecutor or by the defendant ; but it appeared, from the testimony of Mr. *Brookes*, that the prosecutor did not, before the trial, know that the paper had ever been in the hands of Mr. *Bickersteth*, for Mr. *Brookes* declined, at the trial, to name the person from whom he had received the paper, until he was told that he must do so.

The defendant, on the contrary, knew how and in what manner he had parted with the paper ; he knew that his trial was to take place in *Leicestershire*, and he came to the trial ready to object to the county. Upon these facts the question arises, whether the jury might reasonably infer and conclude, in order to satisfy the locality of jurisdiction, that the paper had passed from
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the defendant in the unsealed envelope to Mr. *Bickersteth*, in *Leicestershire*, as the judge informed them they might, in his opinion, do. The learned counsel for the defendant had argued with much ability at the trial, in the hearing of the jury, that the evidence furnished nothing upon which any inference could be drawn of a publication of any kind in the county of *Leicester*; the jury had witnessed the examination of Mr. *Brookes*, who was the agent for the defendant, for transmitting the manuscript to the editors of the public newspapers; this agency is acknowledged by the defendant in his letter to Lord *Sidmouth*. I have considered this question again and again, and with much anxiety, from respect to the different opinion entertained on this point by my brother *Bayley*, and I must say, that in my opinion the premises warranted a conclusion that the paper had been delivered by the defendant in *Leicestershire* to Mr. *Bickersteth*, in the state in which the latter gentleman delivered it to Mr. *Brookes*. The learned counsel have contended, that for any thing that appeared, the paper might have been sealed by the defendant before it quitted *Leicestershire*; that the defendant might himself have carried it out of *Leicestershire*, and delivered it in some other county to Mr. *Bickersteth*, or to some other person, or might himself have put it into some post office out of *Leicestershire*. Now Mr. *Bickersteth* might have proved for the defendant in what state and at what place, and in what manner he had received the paper, but he was not called; and as I have before observed, this was a question which the defendant came prepared to try, so that there was no surprise. The defendant was a member of parliament; he might have sent this paper free of postage, directly to Mr. *Brookes*, and there

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was no apparent reason for his sending it by the post, or otherwise to Mr. *Bickersteth*, in *London*, to give him, (a professional gentleman, as he is described to be, but whose place of residence does not appear,) the trouble of taking it in person to Mr. *Brookes*. The paper professes to have been written in haste, and it appears to have been intended for an immediate publication in the newspapers. It is dated on the 22d, and appeared in at least one morning paper on the 25th. Mr. *Brookes* said he did not recollect on what day, nor indeed at what time in *August* he had received the paper; he said he copied and sent it to the newspapers; this must have occupied some little time. It cannot have been delivered to Mr. *Brookes* later than the 24th; at what time it was finished on the 22d does not appear; the distance of *Kirby Park* from the *Strand* is, I suppose, not less than a hundred miles, but that matter would be better known to the jury than to me. The defendant was proved to have been in *Leicestershire* on the 22d and 23d. To have presumed that he had himself gone out of the county to deliver this paper, for no reason apparent or suggested; or that a paper delivered by a private hand unsealed, and not appearing to have been sent by any conveyance requiring a seal, was in fact sealed before it was dispatched or was sent by any other hand or conveyance, than the hand that delivered it, would, indeed, in my opinion, be to draw a conclusion without any premises to warrant it. It certainly would be to introduce by way of presumption, some new and affirmative matter of fact not found in the evidence, but of which, if really existing, the evidence was in the knowledge and power of the defendant. Then why, in the absence of all the explanation and proof that the

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nature of the case afforded of a delivery out of the county or in a sealed cover, or to another person, if the fact was really such, might not the jury reasonably decline to presume any of those facts, and conclude, from the proof before them, that the defendant had delivered the paper to Mr. *Bickersteth*, in that county in which alone the defendant was proved to have been, and in that state in which alone the paper ever appeared to have been? I can discover no reason why that conclusion might not be drawn; on the contrary, I think it might reasonably be drawn as a legitimate conclusion from the proof given, in the absence of all contradiction.

It is not necessary, to sustain the verdict on this point, that this should be the only conclusion that could be drawn from the premises. Matters of fact are for the determination of the jury; if they draw a conclusion not warranted by the premises before them, it is our duty to correct their error, and to send the case to another trial; but if the conclusion is a reasonable inference from the premises, we ought not to disturb their verdict. I think this conclusion the most reasonable inference from the premises, and that the Judge was perfectly justified in presenting the matter to the jury for their consideration, in this light, with a strong expression of his own opinion in favour of this conclusion.

I have given my opinion thus largely on this point, on account of the great importance that has been attached to it in the course of this cause, and this being my opinion, I might forbear to advert to another topic that has been addressed to us, but I think it right to advert to, and give my judgment on that matter, not

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only on account of its general importance, but because the particular point on which so much has been said, and to which I have already adverted, would, but for an observation made by my learned brother to the jury at the trial, be in my own opinion of little importance on the question properly brought before us, which is, whether there ought to be a new trial. By presenting the matter to the jury, in the mode adopted by my learned brother at the trial, the cause was put as to the point of publication, on an issue much more favourable to the defendant, and giving him a much greater chance of acquittal pro tanto at least, than the law required. For I am most clearly of opinion, that upon the facts proved, and the inference necessarily arising out of them, and also that upon the facts taken simply by themselves, and without deducing any other fact by way of inference from them, and leaving, therefore, as to this part of the case, nothing to be found by the jury that is not already established, the defendant might lawfully be tried, and ought to have been found guilty of the whole charge contained in this information in the county of *Leicester*. And I cannot persuade myself to think that the court would be justified in granting a new trial for the purpose of having certain facts specially found, and put upon the record, if the court be convinced, as I in my judgment and conscience am convinced, that upon the facts so found, the court would be bound to pronounce the defendant guilty, especially in a case wherein that was not asked at the trial. What are the facts? The defendant wrote the libel at his own mansion house in *Leicestershire* on the 22d of *August*; he was seen in *Leicestershire* riding on horseback on that day, and also on the following day; the
paper

paper was delivered to Mr. *Brookes*, in *London*, by a third person on the 23d, or at the latest on the 24th *August*, and this by the authority and procurement of the defendant, for insertion in some *London* newspapers. Upon these facts, can any man hesitate to infer that the defendant, in some way delivered the paper out of his custody in *Leicestershire* that it might pass to *London*? And if he did there deliver it for that purpose, such a delivery was at the least a commencement in *Leicestershire*, of the traditio or act of publication. Now the fact of such a delivery in *Leicestershire*, can scarcely be called an inference, for it is nothing more than saying, that the defendant did the act in the county in which he is proved to have been on the day on which he did it, he not appearing to have been out of the county on that day, and the act being such, as regard being had to his rank and situation in life, would in the ordinary course of things take place at his own house.

But it is said to be possible, that he may have carried the paper out of the county in his pocket, and have parted with it in some other county; and much has been said in the argument about the vicinity of *Kirby Park* to the borders of some other county. I presume the distance is not very great, and some of the jury would probably be acquainted with it. I admit the possibility of the fact suggested, its probability I utterly deny. But if I should even go further, and having first converted the possible into the probable, should then take another step in this process of presumption, and assume the supposed probable to be the real fact, and thus at length conclude, that the defendant did carry the paper out of *Leicestershire* in his pocket, and deliver it from his hands in some other county, to be forwarded to

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Mr. *Brookes*, I should still be bound to say, that the defendant might lawfully be tried, and ought to have been convicted of the whole of this charge in the county of *Leicester*. The commencement of the traditio or delivery, would still be in *Leicestershire* by the act of the defendant himself carrying the paper from his house into that county, in its progress to Mr. *Brookes*. To write and publish a libel is a misdemeanor compounded of distinct parts, each of which parts (for I am speaking of a published libel) being an act done in prosecution of one and the same criminal intention, is a misdemeanor. And where a misdemeanor consists of such distinct parts, I say, without doubt or hesitation, that the whole may be tried in that county wherein any part can be proved to have been done. All that I have heard from the learned gentlemen who have argued the case on the part of the defendant, and have presented this matter to the court in every various view that ingenuity could devise, has not for one instant raised a particle of doubt in my mind; and having no doubt, I should abandon the duty of my office, if I did not declare my own conviction, and act judicially upon it.

If the law should be otherwise, I know not very well what consequence is to follow. At one time it was argued, that the trial could be in that county alone wherein the paper was received and read, which was called the place of the publication. If this be true, one of two consequences must follow, either the party must be convicted of the whole offence in the latter county, and then the jury of that county will inquire into, and find criminal matter committed in another, which would be contrary to other parts of the argument addressed to us, or the party must be acquitted of the writing; and if the

the latter alternative be correct, then an author can never be punished as such if he happen to write at one side of *Temple Bar* and publish at the other. At another time it was contended, that in the case supposed, the party could not be tried in either county, or in other words, that he could not be tried at all; and if it be true that a misdemeanor can be tried in that county alone wherein every part of it has been committed, the impossibility of any trial in the supposed case, would be a conclusion fairly deducible from the premises. But the conclusion would be an absurdity in the law, and the absurdity of the conclusion proves the falsehood of the premises.

Felony stands on a very different ground from misdemeanor; and the assertion that a misdemeanor can be tried in that county alone wherein every part of it was committed, appears to me to have been built upon a mistake of the true ground and reason of the doctrine in felony. This mistake, however, is not new, and therefore in no degree surprising, for we find in many of our books, and even in the preamble of the statute of the second and third *Edward 6. c. 24.*, expressions importing that a jury of one county cannot inquire into, or take cognizance of any fact that happened in another. It was admitted on the present argument, that the generality of these expressions must be so far restrained as to confine their import to criminal matter, or rather to a part of the crime, because daily experience shews, that the proof of introductory or explanatory matter occurring in either county, is received without objection, even in cases of felony. There was a time, however, when it was supposed that a jury could not even in a civil action

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inquire into a matter that did not take place in their own county. In the time of *Henry* the Seventh, an action of debt was brought upon a bond. The condition of the bond, according to the report in one part of the Year-book, was, that if a certain ship should sail to *Lynn*, and from thence go to *Norway*, and return from *Norway* to *London*, then the bond should be void; otherwise, that it should stand good. Now, upon this it was said, that as *Norway* was a place ultra mare, no jury in *England* could try or know whether the ship had been in *Norway*; that the fact upon which the condition depended was, therefore, a matter not triable; and a condition containing matter not triable was the same as a void condition, and that where the condition of a bond was void, it was the same thing as if the bond was made without any condition, and so the bond must stand good and be available as a single bond; and there is much learned and subtle reasoning upon those points, on one side and on the other, and the case was adjourned. So easy is it for men to perplex themselves, and even to deduce absurd conclusions, if once a false proposition be admitted as true. The case occurs afterwards in another part of the book in the following year, and there the condition is differently stated, but still, in such a way to make the return from *Norway* material. It appears not to have been decided at that time, and I have not traced the final result. (10 *H.* 7. fo. 22. 11 *H.* 7. fo. 16.)

The true ground of the doctrine in felony is this; if a felony be compounded of two distinct acts, one of which takes place in one county, and the other in another county, the concurrence of both being necessary to constitute the felony, the party may not be triable in
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either, because, *ex hypothesi*, there is no felony committed in either. The case of a stroke in one county and death in another, was considered by some as of this kind. The stroke was not a felonious act at the time; and the death, though consequential to the act of the striker, seems not to have been considered by them as properly his act, and to remedy this inconvenience, the statute 2 and 3 *Edw. 6. c. 24.* was passed. It seems somewhat extraordinary that the preamble of this part of the statute should be expressed in the terms in which we find it, because (a) Lord *Hale* mentions this point as being doubtful at the common law, and says the more common opinion was that the party might be indicted where the stroke was given, and in the same page there is a reference to *Coles's* case, *Plowden*, 401., to shew that a general pardon, whereby all misdemeanors are pardoned, intervening between the mortal stroke and the death of the party stricken, doth pardon the felony consequentially, because the act that is the offence, is pardoned, though it be not a felony until the party die.

Observations of the same kind may be made upon the case of accessaries in one county, whether before or after the fact, to a felony committed in another county. The act done, whether of prior advice or procurement, or of subsequent receipt and harbouring, is not a felonious act, if taken singly and by itself; but requires the concurrence of some other act, to give the felonious character. Both descriptions are provided for by the same statute, though the preamble speaks only of accessaries after the fact; and the case of accessaries before the fact does not seem to have been very clearly settled at the common law, for according to a case in *Keilway*, p. 67,

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it appears that accessaries before the fact, in one county, to a murder committed in another, might be arraigned and tried in the county where the murder was committed. In the Year-book, 9 *Edward 4. pl. 48.* there is a case of a person *indicted in Middlesex*, for there procuring one *I. S.* to commit a murder, who committed it in *Berks*; and because the accessory could not be arraigned until the principal was attainted or acquitted, the Court wrote to the justices and coroners of *Berks* to certify whether *I. S.* was indicted for the murder, and upon a return that he was not, the accessory was discharged. Now, it was wholly unnecessary to obtain such a certificate, and the party ought to have been discharged immediately, if the indictment against him in *Middlesex* could not be sustained, in case the principal had been convicted in *Berkshire*. In the case of the appeal of robbery reported in *Dyer*, fol. 38, it appears to have been the opinion of one, if not both the judges present, that the procurer of a felony might be indicted in the county where his procurement was. But in that case an appeal of robbery brought in *Wiltshire*, where the robbery was committed, against the procurers thereof in *London*, was quashed; for, says Lord Coke, in *Bulwer's case*, 7 Coke, 2 b. who there cites this case of the appeal from *Dyer*, "in case of felony, which concerns the life of a man, every act shall be tried in the proper county where the act was in truth done." This case of life, though, perhaps, not a good logical reason for a distinction, is, undoubtedly, a ground for the utmost caution, and is well known to have operated strongly upon the minds of judges in all times. It has, indeed, led in some cases to such subtilty and refinement of construction, and to the giving way to such nice and formal objections, as were in the opinion of

of Lord *Hale* a reproach to the law. But as the reasons which may be assigned in cases of felony do not apply to other cases, so neither has any instance been found wherein a misdemeanor, composed of acts in different counties, each act being in itself a misdemeanor, has not been held wholly triable in that county wherein any criminal part was committed. The case of the seven bishops, which was referred to in the motion, does not establish any thing of this kind; for in that case, which was an indictment in *Middlesex*, there was not at any period of the trial, any proof of the writing in *Middlesex*, nor, for a very long period, any proof of a publication in *Middlesex*. And the difficulty as to the locality of trial, was in the end so far removed as to become a question for the jury, under circumstances to which I need not now advert, by the testimony of the lord president of the council. And even after his testimony, the identity of the paper was to be collected by inference, which was not objected to. The doctrine of Lord *Coke* in 3 Institute, page 80, in his commentary on the statute 4 *James* 1. cap. 8., was applied to the case of felony. I will now refer to *Bulwer's* case, and the authorities there cited, premising only that I am not aware of any authority pointing to a distinction between local actions and indictments for misdemeanors. The power of the jury appears, upon principle, to be not less limited in the one case than in the other. *Bulwer's* case was an action brought in the county of *Norfolk*, for maliciously causing the plaintiff to be outlawed in *London*, upon process sued out of a court at *Westminster*, and causing him to be imprisoned in *Norfolk* upon a *capias utlagatum* directed to the sheriff of that county, but issued at *Westminster*. It was objected

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objected that the action was not maintainable in the county of *Norfolk*, but the contrary was decided, because where matter in one county is depending upon matter in another county, the plaintiff may choose in which county he will bring his action, unless the defendant should be prejudiced in his trial. And of this proposition numerous instances are there cited relating to actions, some of which were then considered as local, though, perhaps, they might not be so now, and others which would still be so considered. Among the instances, are conspiracy in one county to indict a man falsely, followed up by an indictment preferred by the same parties in another county; neglect to repair a wall in *Essex*, whereby the plaintiff's land in *Middlesex* is overflowed; and the forgery of a deed in one county, and publication of it in another. This last instance exactly resembles the writing of a libel in one county, and publication of it in another, and is less strong than the writing in one county and sending or carrying from thence into another, in order that it may be received and read. For the sending or carrying in the latter case, is the commencement of the publication; the receipt and reading are its consummation; the sending is the act of the party, and so also is the carrying of it, if it be carried by the writer; and the melior notitia that has been alluded to, seems to be, as it regards such a party, in the county in which his own acts are done.

A very early instance of misdemeanor, wherein the whole matter was enquired into in one county, is *Danby's* case in 2 *Richard 3.* fo. 10., cited in 1st *Pleas of the Crown*, fo. 652. The proceedings, to an outlawry, consisting of an original writ, three writs of *capias*, and a writ of *exigent*, had been altered, by the erasure of
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the christian name of the defendant, who was therein called *John*, and the substitution of *William* in its place. This alteration in the original writ was made by one person, in *London*, and in the several other writs, by three other persons, in *Middlesex*. The whole matter, taken together, was considered as a felony, under the statute of 8 *Henry* 6. c. 12. It seems that the several writs were considered as constituting but one record; and this offence, thus committed in parts, was held not to be triable as a felony; but it was held, that the one offender might be tried in *London* and the others in *Middlesex* for the misprision, which was accordingly done, and they were punished; and though it may be true, as was said by one of the learned counsel, that the whole act of the person tried in *London*, was committed there; yet it seems to have been thought necessary to prove all that had occurred in *Middlesex*. A part, viz. the issuing of the writ, was certainly necessary, but this was no criminal part; and the case is not so material in itself, as for the observations made upon it by Lord *Hale*. “And yet observe,” saith he, “the felony was one entire felony, committed in two counties, and so neither enquirable nor determinable in one county; for the jury of that county cannot take notice of part of the fact committed in another; and yet the misprision of that felony was enquirable and punishable in either county, where but part of the felony was committed; and yet the jury, in that case, must take notice of the entire felony, part whereof was committed in another county.” The expression misprision of felony, does not seem to be very correctly used in this case; for misprision of felony is the concealment of a fe-

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lony, knowing it to have been committed by another. This was the case of acts done by the parties themselves.

In the case of *The King v. Williams*, in 2 *Campbell*, 505., which is reported to have been an indictment in *Middlesex*, for sending, but was, in fact (as appears by the record), an indictment for composing and writing, and causing to be composed and written, and sending and delivering, and causing to be sent and delivered, a libellous letter, with intent to provoke a challenge; the letter being sealed up, was put into the post-office, by the defendant, in *Westminster*, addressed to the prosecutor, in *London*, who received it there. Objection being taken, that there was not any evidence of an offence committed in *Middlesex*, Lord *Ellenborough* said there was a sufficient publication in *Middlesex*, by putting the letter into the post-office there, with intent that it should be delivered to the prosecutor elsewhere. In the case of *The King v. Watson*, 1 *Campbell*, 215., the prosecutor failed in proving that the first letter was put into the post-office in *Middlesex*, and it was received in another county. Mr. Justice *Grose*, in delivering the judgment of the Court, in *The King v. Brisac and Another*, 4 *East*, 171., says, "There seems no reason why the crime of conspiracy, amounting only to a misdemeanor, may not be tried, wherever one distinct overt act of conspiracy is, in fact, committed, as well as the crime of treason. In *The King v. Bowes and Others*, the trial proceeded upon this principle; where no proof of actual conspiracy, embracing all the several conspirators, was attempted to be given, in *Middlesex*, where the trial took place, and where the individual actings of some of the conspirators were wholly confined to other counties

counties than *Middlesex*; but still the conspiracy, as against all, having been proved, from the community of criminal purpose, and by their joint co-operation in forwarding the objects of it in different places and counties; the locality required for the purpose of trial, was holden to be satisfied by overt acts done by some of them, in prosecution of the conspiracy in the county where the trial was had." Another instance of this kind, is the decision of the Judges, in the case of *The King v. Buttery*; he was indicted on the statute of 30 Geo. 2. c. 24. s. 1., for obtaining money by false pretences. The language of the statute makes the offence to consist in obtaining the money, and not in using any false pretence, whereby money shall be obtained. The indictment was in *Herefordshire*, the false pretence was in *Herefordshire*; but the money was received in *Monmouthshire*; the Judges thought the indictment was laid in the wrong county; they did not think the party not indictable at all, which they ought to have done, if the proposition addressed to us be true, because the pretence which was necessary to constitute the crime was in one county and the receipt in another; and so there was no entire crime in either. The instances of treason which were alluded to by Mr. Justice Grase, are well known; see 1 *East's Pleas of the Crown*, 130., and they go this length, viz.; that one witness to an overt act in the county wherein the indictment is preferred, is sufficient, if another overt act in another county be proved by another witness; and so, as there can be no conviction, but by the testimony of two witnesses, the jury must take cognizance of criminal matter committed out of their county, as the foundation of a conviction; and treason and misdemeanor are alike distinguishable from

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felony, on the ground that I have already mentioned, viz., that each act is an offence of the same species with every other and with the whole; whereas an act requiring the concurrence of some other act or matter, to constitute a felony, may not be in itself a felony, and may either be an offence of a different nature, punishable as such, or lose its character by merger in the other act or matter, so as to become dispunishable, for want of the locality necessary to a trial.

In cases of felony, the legislature has, on more than one occasion, intervened to prevent the failure of justice, occasioned by the rule to which I have adverted. I am not aware that the legislature has interposed in any case of misdemeanor; and I cannot help thinking that the absence of any such enactment furnishes an argument to shew that nothing of this kind has been thought necessary, and that it has been generally understood that a conviction for a misdemeanor might take place in the county wherein any such part thereof as I have mentioned should have been committed, for otherwise there would, in many cases, be a great failure of justice. I cannot, therefore, do otherwise than say I am clearly of opinion in the way I have expressed myself, and for the reasons I have given, that if any such part of an entire misdemeanor be proved to have been done in the county in which the indictment is preferred, there is enough to satisfy the locality of trial, and here there is not only the fact of composing the paper in the county of *Leicester* but some act must have been done by Sir *F. Burdett* by delivering the paper, or carrying it himself out of that county. Some act must have been done in that county as the commencement of sending it for publication.

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The next ground taken in support of the motion for a new trial was, that the learned judge had rejected evidence offered at the trial to prove that some of the king's subjects had been killed and wounded by the dragoons on the 16th *August*, or, in other words, that evidence of the truth of the fact, alleged in the libel as the foundation and cause of the remarks therein contained, was tendered and refused. I am of opinion, that this evidence was properly refused. The whole history of the law of libel shews that such evidence has been almost invariably refused on all occasions of criminal prosecution for slanderous observations and remarks upon the administration of the government, or upon the conduct of public or private men. The reason of this part of the law has been so often explained, that it is altogether unnecessary to enter into it at present. I will only quote the opinion of one of the most eloquent writers of antiquity, who united the characters of philosopher and statesman. *Cicero* having cited the law of the twelve tables, made for the punishment of any one, "qui carmen condidisset quod infamiam afferret flagitiamve alteri," immediately subjoins "Præclare judiciis enim ac magistratuum disceptationibus legitimis propositam viam non poetarum ingeniis habere debemus, nec probrum audire nisi ea lege ut respondere liceat et judicio defendere." The case of the Seven Bishops has been mentioned as an instance of evidence received on the part of a defendant; but in that case the evidence was not offered to prove any matter of fact mentioned in the supposed libel, which was a petition to the king, but to shew that the king had not the power of dispensing with an act of parliament, which was matter of law; and the evidence consisted of

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the records of proceedings in parliament, and was addressed to the Court rather than to the jury. The case of Mr. *Horne*, tried before my Lord *Mansfield*, was also quoted, as an instance of receiving evidence of facts. Upon looking into that case, it appears that Mr. *Horne*, who conducted his own defence, did not open his evidence to the jury, as usual, but sat down without proposing to call any witnesses; and when he afterwards proposed to call some, and the Attorney-General objected, Lord *Mansfield* said, "You had better not object; you had better hear his witnesses." And they were accordingly examined. Such an instance can, in my opinion, be of no avail against the current of prior and subsequent practice; it certainly can be of no avail against the opinion of the Judges, delivered in the House of Lords, in answer to a question on this particular point, propounded to them by the House on the occasion of the passing of the statute 32 G. 3. c. 60, commonly called the Libel Bill; and the still more important fact that the legislature having its attention directed to this subject at that time, left the law in this respect in the situation wherein the Judges reported it to stand. Another case, that occurred before me, was also referred to; in that case, however, the truth was not offered in evidence by way of defence, but the evidence of the falsehood was adduced by the prosecutor, as necessary to support the charge. No objection was made on the part of the defendant; and although I was not free from doubts in my own mind, yet, adverting to the particular nature of the supposed libel, which contained little more than a narrative of certain facts, supposed to have taken place in one of the *West India* islands, I did not think myself warranted in interposing
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under the very peculiar circumstances of that case; and, having received evidence of the falsehood, I should, most undoubtedly, have received evidence of the truth, if any such had been offered, on the part of the defendant.

Another ground of the motion was, that the learned Judge gave his own opinion to the jury upon the character of the publication in question, expressing himself at the same time somewhat to this effect: You are to say whether you will adopt this opinion or not; and unless you are satisfied that I am wrong, you will take the law from me. This was supposed to be contrary to, or at least beyond, the duty of the Judge, as prescribed by the statute to which I have just alluded; it was, however, in my opinion, not only not contrary to or beyond the duty of the Judge as prescribed by that statute, but in strict conformity to it. The clauses of the statute have been referred to. If the Judge is to give his opinion to the jury, as in other criminal cases, it must be not only competent but proper for him to tell the jury, if the case will so warrant, that in his opinion the publication before them is of the character and tendency attributed to it by the indictment; and that, if it be so in their opinion, the publication is an offence against the law. This has been repeatedly done by different Judges within my experience, and I am not aware of any instance in which it has been omitted. The contrary has sometimes occurred, in cases where the Judge has thought that the matter of the publication was innocent; but those cases also are instances of an opinion given, and not of silence on the part of the Judge, as to the law of the case. The statute was not intended to confine the matter in issue exclusively to the jury

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without hearing the opinion of the Judge, but to declare that they should be at liberty to exercise their own judgment upon the whole matter in issue, after receiving thereupon the opinion and directions of the Judge. For these reasons I am of opinion that the rule ought to be discharged.

BEST J. I entirely agree with my Lord Chief Justice and my Brother *Holroyd*, in the opinion, that if a libel be written in one county and published in another, the libeller may be prosecuted in either.

Rule discharged.

CAMELO *against* BRITTEN.

A licence for the exportation of gunpowder was granted on the petition of *A. B.* on behalf of himself and others, on condition that the merchant exporter should give a certain security therein mentioned.

A. B., the manufacturer of the gunpowder, sold it to *C. D.*, and contracted to deliver it free on board a ship: Held, that the condition of this licence was not complied with by *A. B.*'s giving the required security, he not being the merchant exporter within the meaning of the licence.

ACTION on a policy of assurance, dated the 30th *January* 1817, effected in the name of the plaintiff at and from *London* to *Pernambuco*, to wait orders to enter there or proceed for *Maranham*, by the policy the insurance was expressed to be on wine, shot, lead, gunpowder, and goods in bales and cases, valued at 2500*l.*, at a premium of 50*s.* per cent. The first count of the declaration alleged that the defendant subscribed the policy for 200*l.*; that the plaintiff was interested; that the ship sailed with the goods insured on board, and that afterwards, to wit, on the 15th *April*, the said ship or vessel with the said goods and merchandizes on board thereof, arrived off *Pernambuco* aforesaid; and that afterwards, and before the said ship or vessel could enter *Pernambuco* aforesaid, and during the continu-

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ance of the said voyage; to wit, on the day and year last aforesaid, the said ship or vessel with the said goods and merchandizes on board thereof as aforesaid, was with force and arms arrested, seized, and detained by certain officers and subjects of the King of *Portugal*, and carried to a certain other port; to wit, the Port of *Bahia*. And that afterwards, to wit, on the 22d *May* in the year aforesaid, at *Bahia* aforesaid, the said goods and merchandizes were condemned and confiscated; and thereby the said goods and merchandizes became and were wholly lost to the plaintiff. The second count alleged the loss generally by seizure and detention. Plea, general issue. The cause was tried before *Abbott C. J.* at the sittings at *Guildhall* before *Easter Term 1819*, when the jury found a verdict for the plaintiff, subject to the opinion of the court on the following case.

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The defendant subscribed the policy for 200*l.*, and the plaintiff was interested in the goods insured. The plaintiff is by birth a *Portuguese* subject, but has been domiciled in *London*, and has carried on trade there as a merchant since the year 1809. *Pernambuco* and *Maranhã* are parcel of the dominions of the crown of *Portugal*. The *Venus*, the ship mentioned in the policy, was chartered by Messrs. *Josling, Allen, and Freneira*, *Portuguese* merchants in *London*, in *January 1817*, to carry out a cargo of sundry merchandize to *Pernambuco* and *Maranhã*, and to bring back a return cargo. The goods insured consisted of 9 hogsheads of *Madeira* wine, 6 pipes of red wine, 30 barrels of small, or bird shot, 4 rolls of sheet lead, 10 cases and 14 bales of manufactured goods, and 100 barrels of gunpowder. For a number of years past, gun-
powder

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powder has been usually shipped from this country to *Pernambuco* and *Maranhã*, and imported there, but if the *Portuguese* government did not choose to purchase such gunpowder, the shipper was obliged to re-export it, unless in occasional instances, where a sale to other people has been allowed by that government. The form of shipping goods including gunpowder in *London*, on a voyage to *Pernambuco* and *Maranhã*, has been to exhibit the cockets and manifest at the office of the *Portuguese* consul, who certifies the same, and affixes his consular seal to them. The cockets and manifest so certified, proceed with the ship, and must be delivered at the custom-house at the destined port, before the ship is admitted to entry. Copies of them are likewise sent by the *Portuguese* consul in *London*, to the custom-house at the port of destination, by the first opportunity. The *Venus* was cleared in this form at the office of the *Portuguese* consul, for the voyage in question. She carried 400 barrels of gunpowder, 300 having been shipped by *Josling, Allen, and Freneira*, on their own account, and the remaining 100 on account of the plaintiff. The cockets and manifest of the whole cargo were certified in the manner above stated, and proceeded with the ship to be exhibited to the custom-house at *Pernambuco*. The whole of the gunpowder was manufactured in this country by one *Mark Fossett*, and sold by him to the house of *Josling, Allen, and Freneira*, and to the plaintiff. *Mark Fossett*, who usually applied for licences for the exportation of gunpowder, manufactured by himself, was employed by *Josling, Allen, and Freneira*, and the plaintiff, to procure a licence for the exportation of the 400 barrels of gunpowder, to be shipped in the *Venus*, and procured a licence from government,

of

of which the following is a copy; "At the council chamber *Whitehall*, the 25th *January*, 1817. Present, the Lord of his Majesty's Most Honourable Privy Council: Whereas, there was this day read at the board, the humble petition of *Mark Fossett*, on behalf of himself and other persons, praying leave to export 500 barrels of gunpowder from *London* to *Pernambuco*, on board the *British* ship *Venus*, *Lawson* master: which petition being taken into consideration, it is hereby ordered in council, that the petitioners be permitted to export the quantity of gunpowder above mentioned, from *London* to *Pernambuco*, on board the said ship, provided the merchant exporter do first give security by bond to the proper officers of the customs, with two other able and sufficient sureties (of whom the master of the ship to be one) to be approved of by the said officers of the customs, in six times the value of the gunpowder, to export the same to the place proposed, and none other; and to produce a certificate within eighteen months from the date of the bond from the *British* consul, or vice-consul of *Pernambuco*, of the gunpowder having been all duly landed at that place; which certificate the commissioners of the customs are required to transmit to the lords commissioners of his Majesty's treasury, in order to be laid before this board. And in failure of the production of such certificate within the time limited by this order, the bond so entered into to be put in suit; and the right honourable the lords commissioners of his Majesty's treasury are to give the necessary directions herein accordingly. (Signed) *James Buller*."

On the 29th *January*, a bond for 7200*l.*, in the common form, to his majesty, was executed by the said

Mark

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Mark Fossett, Henry Cooper, and James Lawson, the master of the said ship. The condition was as follows:

“Whereas, by an order in council, dated 25th *January*, 1817, permitting *Mark Fossett*, on behalf of himself and others, to export 500 barrels of gunpowder to *Pernambuco*, on board the *British* ship *Venus*, *Lawson* master, provided the *merchant exporter* shall first give security, by bond, to the proper officers of the customs, with two other able and sufficient sureties, of whom the master of the ship to be one, to be approved of by the said officers of the customs, in six times the value of the said gunpowder, to export the same to the place proposed, and none other; and to produce a certificate, within eighteen months from the date of the bond, from the *British* consul or vice-consul, at *Rio Janeiro*, of the said gunpowder having been all duly landed at that place: And whereas the said *Mark Fossett*, this day, entered outwards, at the custom-house, *London*, on board the above ship *Venus*, *James Lawson*, for *Pernambuco*, 400 barrels of gunpowder. Now the condition of this obligation is such, that if all the said gunpowder shall be exported to *Pernambuco*, and a certificate of the due landing the same at that place, produced within eighteen months from the date hereof, from the *British* consul or vice-consul, then the obligation to be void and of none effect, or else to remain and be in full force and virtue.” The above bond was approved of by the proper officers of the customs, and the gunpowder was thereupon allowed to be shipped. The clerk to the person who supplied the bird-shot proved that it was not considered as warlike stores. The goods of the plaintiff, being shipped on board the said vessel, were all consigned, on his account, to *Manoel Ribeiro das Silva* at *Pernam-*

Pernambuco. The ship sailed on the voyage, insured on the 4th *February*, 1817, and was obliged to put into *Spithead*, where she was detained by contrary winds till the 12th *March*, when she again proceeded for *Pernambuco*. On the 15th *April* she made the land, eight miles to the northward of *Pernambuco*, and stood to the southward to make the port. The master hoisted *English* colours, and made the usual signal for a pilot. No pilot came on board, but two *Portuguese* ships of war were seen standing in for the roads of *Pernambuco*, and the master of the *Venus* steered towards them to make enquiries respecting the anchorage, being a stranger to the place. When the *Venus* approached the *Portuguese* ships, one of them fired a shot at her, and sent a boat to board her. An officer and several men from such boat did immediately board her. This officer asked Captain *Lawson* where he was bound to, and upon his saying to *Pernambuco*, the officer told him his ship must not go into *Pernambuco*, but must come to anchor between the two ships of war. The said officer immediately took possession of the *Venus*, and desired one of his men to take the helm, who did so accordingly, and she was thereupon brought to anchor between the two ships of war. The *Portuguese* officer then compelled the captain to deliver up all the ship's papers, and to go on board one of the ships of war called the *Spirito Santo*. The papers were inspected by the officers of that ship, put into a bag, and delivered to the prize-master. The same evening the captain was again sent on board the *Venus*, and the person to whom the ship's papers were delivered, with eight *Portuguese* sailors, went on board likewise, and took command of the *Venus* as prize-master; eight
of

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of her crew were at the same time taken out and sent on board the ships of war. On the following morning the *Venus*, under the command of the prize-master, sailed for *Bahia*, a *Portuguese* settlement, where she arrived on the 21st *April*. As soon as she was anchored in the bay, several boats, containing officers of various descriptions, came alongside, and the officers entered and remained on board. On the 23d *April* she was removed higher up the harbour, and on the 28th a soldier was put on board as a sentinel, and was relieved night and morning. On the 30th *April* and 3d *May* several custom-house officers, and about 80 men, seized and carried away from on board the *Venus* the 400 barrels of gunpowder, and conveyed them to the fort at *Bahia*. The whole of the cargo was removed in the same manner between that day and the 9th *May*, a sentinel remaining on board till then, when he was withdrawn. Neither the captain nor the mate, nor any of the crew of the *Venus*, was ever cited in or made party to any judicial proceedings respecting the said goods, or was ever examined as a witness in any court of justice, or upon interrogatories, at *Bahia* or elsewhere respecting the goods. When the captain arrived off *Pernambuco* he did not know, nor had he received any notice or heard, that *Pernambuco* had been or declared to be, or was in a state of blockade, and he first heard of such blockade two days after being taken possession of by the *Portuguese* ships of war. An insurrection broke out at *Pernambuco* in *February*, and was not heard of in *London* till *June*. As soon as the plaintiff heard of the ship being seized (viz. on the 26th *June*, 1817) he gave notice of abandonment to the defendant and the other underwriters on the policy.

The

The case then stated a proclamation of the Prince Regent, dated the 2d *January* 1817, prohibiting the exportation of gunpowder without licence, to certain places therein mentioned, amongst which were the territories of the king of *Portugal*, in *America*. The case then set out the sentence of a court, describing itself as a supreme court of judicature at *Bahia*, stating, that it appeared from the proceedings before them, that the *English* brig *Venus* being bound to the port of *Pernambuco*, with a cargo consisting of 400 barrels of gunpowder, and other warlike stores, at a time when the port was under blockade, in consequence of an insurrection of its inhabitants, the said brig was detained and ordered to be sent into the port of this city, by reason of the 400 barrels of *English* gunpowder which she was so conveying to a blockaded port, being an article expressly prohibited, and declared to be contraband by the decree of the 26th *February* 1810; and the laders and owners of such article being consequently comprehended and included in the penalties imposed by the letters patent of the 5th *January* 1785, against all dealers in contraband articles. The decree then proceeded to condemn the gunpowder. The case was argued in last *Hilary* term by

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Campbell, for the Plaintiff. Prima facie, the underwriters in this case, are liable for a total loss with benefit of salvage. The ship was captured, the goods insured were taken from the possession of the master and crew, and never were restored, and there was a notice of abandonment. The first objection anticipated is, that the loss arises from the act of the government of the assured, for a contravention of the laws of that government; but the sentence
 set

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set out in the case, is not the sentence of an Admiralty Court proceeding upon the law of nations, but of a municipal court proceeding upon the particular ordinances of the state under whose authority it acts. The sentence, therefore, is not receivable as evidence of any of the facts which it alleges. There is nothing to shew that this trade was contrary to the laws of *Portugal*; and if it were so, it would not, for this reason, be considered illegal in our courts, and a valid insurance might, nevertheless, have been effected upon it. The plaintiff being domiciled in *England*, he was to be considered, for the purposes of commerce, as a *British* subject; and our Courts do not regard the fiscal regulations of foreign states. This was a well-known trade; and as the goods are specified in the policy, the underwriters well knew the hazard they were undertaking. They must shew, therefore, that the adventure is contrary to the law of this country; and an attempt will be made to do so, on the ground, that there being, at the time, a proclamation in force under 12 *Car. 2. c. 4. s. 12.* and 33 *G. 3. c. 2. s. 4.* against the exportation of gunpowder and ammunition, a licence was necessary, and no sufficient licence was obtained. It was objected, that the licence does not at all extend to the shot; but the case finds that this was merely bird-shot, which, from the purposes to which it is commonly applied, cannot be considered ammunition, or warlike stores. As far as concerns the gunpowder, it is said, that the licence was only conditional, and that the condition on which it was granted has not been fulfilled, as a bond ought to have been entered into by the plaintiff himself: but *Fossett*, who executed the bond, may well be considered the merchant exporter, as it was his duty to put the gunpowder

powder on board the ship in which it was to be exported. The bond was given in the manner in which this trade is uniformly carried on; for the vender of the gunpowder, who ships it for exportation, uniformly gives the bond as the merchant exporter. This bond was quite satisfactory at the custom-house, and, as the assured acted with perfect good faith, the Court will not look with astuteness to any supposed irregularity, which had no connection with the loss, and, in no respect, encreased the risk of the underwriters.

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Puller, contra. The assured must be considered to have brought about the loss himself, as it was the act of his own government. The goods were taken by *Portuguese* ships of war, commissioned by the *Portuguese* government, and condemned by a *Portuguese* court. [*Bayley* J. The seizure is by one of the vessels of the *Portuguese* government; but the condemnation is not the act of an admiralty court.] [*Abbott* C.J. It is stated to be the supreme court of judicature; but it is not stated that it had jurisdiction in admiralty matters.] He cited *Conway v. Grey*. (a) [*Bayley* J. There the act which caused the loss was the authorised act of the government.] Here the plaintiff is a subject of *Portugal*, and the loss is occasioned by the act of the *Portuguese* government, in condemning a ship for the breach of a blockade which they themselves had made. [*Bayley* J. Here it is not the blockade, but the breach of the blockade, which occasioned the loss.] Another objection to the plaintiff's right to recover is, that part of the cargo consisted of bird-shot, which is not

(a) 11 *East*, 502.

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included in the licence. Now, although bird-shot be not warlike stores, yet it fairly comes within the description of arms and ammunition. [*Abbott C. J.* I cannot think that bird-shot can be considered to come within that description.] The great objection, however, in this case to the plaintiff's right to recover is, that the condition upon which the licence was granted has not been complied with. The condition is, that the merchant exporter should give the security required by the bond. Now, here, the plaintiff was the merchant exporter of this gunpowder, and not *Mark Fossett*, who only petitioned for the licence on behalf of himself and others. The plaintiff has not given the required security, and consequently the terms of the licence have not been complied with. The exportation of the gunpowder was therefore illegal; and the policy, being one entire contract, is wholly void. *Parkin v. Dick. (a)*

Campbell, in reply, was desired by the Court to confine himself to the objection, that the bond actually executed was not a sufficient compliance with the condition of the licence; and he contended, that inasmuch as *Mark Fossett*, on behalf of himself and others, prayed leave to export, he might be considered as the merchant exporter, within the meaning of the licence. If the word *said* had been introduced, there could have been no doubt upon the subject; because, then, it must have referred to *Mark Fossett*.

Cur. adv. vult.

(a) 11 *East*, 502.

ABBOTT C. J. in the course of this term delivered the judgment of the Court. After stating the facts of the case, he proceeded as follows :

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The question in this case is, whether we can consider *Mark Fossett* as the exporter of this gunpowder, within the meaning of the licence. It appears that he was the manufacturer of the gunpowder, and that he sold it to the plaintiff. It appears, also, from the affidavit accompanying the petition upon which the licence was granted, (a) that he was to ship it free on board. Having done that, he then ceased to have any further interest in the adventure. The shipment having been made, the goods were the property and under the control of the present plaintiff: he, therefore, was the merchant exporter, and ought to have given the security required by the licence. We have arrived at this conclusion with great reluctance; because it appears that in this case there was no intention to violate the law, and that this was the usual mode of carrying on the trade. We, however, feel ourselves obliged to say that the terms of the licence have not been complied with: the consequence of which is, that the plaintiff cannot recover, and that there must be judgment of nonsuit.

Judgment of nonsuit.

(a) This affidavit is not set out in the case. It was laid before the Court by consent of both parties after the argument.

1820.

REGULA GENERALIS.

Michaelmas Term, 1820.

WHEREAS by the common consent rule in actions of ejectment, the defendant is required to confess, lease, entry, and ouster, and insist upon his title only: and whereas, in many instances of late years, defendants in ejectment have put the plaintiff, after the title of the lessor of the plaintiff has been established, to give evidence that such defendant was in possession (at the time the ejectment was brought) of the premises mentioned in the ejectment, and for want of such proof have caused such plaintiffs to be nonsuited: and whereas such practice is contrary to the true intent and meaning of such consent rule, and of the provisions therein contained for the defendants insisting upon the title only: it is therefore ordered, that from henceforth in every action of ejectment the defendant shall specify in the consent rule, for what premises he intends to defend, and shall consent in such rule to confess upon the trial, that the defendant (if he defends as tenant, or in case he defends as landlord, that his tenant) was at the time of the service of the declaration, in the possession of such premises; and that if upon the trial the defendant shall not confess such possession as well as lease, entry, and ouster, whereby the plaintiff shall not be able further to prosecute his suit against the said defendant, then no costs shall be allowed for not further prosecuting the same, but the said defendant shall pay costs to the plaintiff, in that case to be taxed.

By the Court.

THE END OF MICHAELMAS TERM.

C A S E S

ARGUED AND DETERMINED

1821.

IN THE

Court of KING's BENCH,

IN

Hilary Term,

In the First and Second Years of the Reign of
GEORGE IV.

COWIE and Another *against* HALSALL.

Tuesday,
January 23d.

ACTION by the indorsee against the acceptor of a bill of exchange. The first count of the declaration stated the bill to have been drawn by one *S. Daniel* and accepted by the defendant, payable at *Mr. Bidlake's, 48. Chiswell Street*. The second count stated a general acceptance. At the trial before *Abbott C. J.* at the *London* sittings after last *Michaelmas* term, it appeared in evidence, that the bill was originally accepted by the defendant generally, and that the words "payable at *Mr. Bidlake's, 48. Chiswell Street,*" were not in the handwriting of the acceptor; and the jury, upon a question submitted to them, found specially that the bill was

A bill of exchange having been accepted generally, the drawer, without the consent of the acceptor, added the words, "payable at *Mr. B.'s, Chiswell Street:*" Held, that this was a material alteration, and that the acceptor was thereby discharged.

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altered by the drawer without the consent of the acceptor, and *Abbott C. J.* was of opinion, that such an alteration vitiated the bill, and then directed the jury to find a verdict for the defendant.

Marryat now moved for a new trial, and contended that the defendant was liable upon the general acceptance, and he distinguished this case from *Tidmarsh v. Grover (a)*, because the bill, in that case, was originally made payable at *Bloxam and Co.'s*, and their name was erased and that of *Esdaile and Co.* inserted. The acceptor, therefore, had never undertaken generally to pay the bill, but only to pay it at a particular place, and the alteration was in a special acceptance. Here, however, the party was originally liable by his general acceptance, and that liability still continues. In *Master v. Miller (b)*, where the date of the bill was altered, the liability of the party was changed; and the original contract did not remain as it does here. The whole effect of this alteration is to impose an additional duty on the holder of the bill, but the contract of the acceptor is not thereby changed.

ABBOTT C. J. It is perfectly clear, that if the circumstance of the bill being made payable at a particular place, be a material part of the instrument, this addition to it by the drawer, without the concurrence of the acceptor, will vitiate it altogether. Now an acceptance is a material part of a bill of exchange; and may be either general or special. By a general acceptance, the acceptor undertakes to pay the bill at any

(a) 1 M. & S. 735.

(b) 2 H. BL 141,

place where he may be called upon. By a special acceptance, he undertakes to pay at the place named in the bill. This alteration made it a special acceptance, to pay the money at Mr. *Bidlake's, Chiswell Street*. Until these words were introduced, the acceptor would be bound to pay the bill at any place. According to the late decision in the House of Lords in the case of *Rowe v. Young (a)*, this forms so material a part of the contract, that unless the bill be presented at that place, the acceptor is not liable at all. I am, therefore, of opinion that the addition made to this bill by those words was an alteration in a material part of the instrument, and having been made without the privity of the acceptor, the bill thereby became void.

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BAYLEY J. I am of the same opinion. Any material alteration in a written instrument vacates it; and I think this was a material alteration; for it might subject the party to some inconvenience. The holder would present the bill at *B.*, where, of course, under these circumstances, it would be dishonoured; and he might then, after sending by the post notice of the dishonour, immediately sue out a writ, and arrest the acceptor.

HOLROYD and BEST Js. concurred.

Rule refused.

(a) 2 B. & B. 165.

1821.

Wednesday,
January 24th.

SMITH *against* THATCHER.

When the acceptor of a bill of exchange, having made it payable at Messrs. C. and Co.'s, has not sufficient effects in their hands at the time when the bill becomes due, he is not entitled to notice of its dishonour: Query, whether, in the case of such an acceptance, any notice be, under any circumstances, necessary.

ASSUMPSIT by the plaintiff, as drawer of a bill of exchange, against the acceptor; the bill was dated *July* 25th, 1820, and was drawn for the sum of 300*l.* payable at two months, and accepted by the defendant, payable at Messrs. *Coutts* and Co. Plea, general issue. At the trial, at the sittings at *Westminster*, after last *Michaelmas* term, before *Bayley* J., the Plaintiff proved the acceptance and dishonour of the bill. No proof was given of any notice of dishonour to the defendant, but the plaintiff proved, that at the time when the bill was drawn, the defendant had a balance with Messrs. *Coutts* and Co., of 712*l.* 13*s.* 3*d.*, and that when the bill became due, this balance had been reduced to 4*l.* 1*s.* 4*d.* Upon this evidence being given, *Bayley* J. was of opinion, that the defendant was not entitled to notice of the dishonour of the bill, and the plaintiff obtained a verdict; and now,

Brougham moved for a rule nisi to enter a nonsuit. In this case the defendant was entitled to notice. It is true, that in *Bickerdike v. Bollman* (a), it was determined, that where the drawer has no effects in the hands of the drawee, he is not entitled to notice; but Lord *Ellenborough*, in *Orr v. Maginnis* (b), held, that if there be any effects of the drawer in the hands of the drawee at the time, it would be very dangerous and inconvenient, merely on account of the shifting of a balance, to hold

(a) 1 T. R. 405.

(b) 7 East, 359.

notice not to be necessary. Now the principle there laid down applies to this case. Here, the acceptor had effects in the hands of *Coutts* and Co., at the time of his acceptance, sufficient to discharge the bill, and the balance was a shifting one, during the whole of the interval between that time and the time of presentation for payment; and *Hammond v. Dufrene* (a) is to the same effect.

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ABBOTT C. J. The case of *Orr v. Maginnis* turned principally upon the want of a protest for non-acceptance of a foreign bill of exchange; and I do not think that the principle now contended for is there laid down with sufficient generality to be applicable to the present case. It may be very doubtful, whether any notice at all be necessary, under any circumstances; for here, the acceptor having appointed a special place for payment, may, perhaps, be considered as having made Messrs. *Coutts* and Co. his agents, for the purpose of paying the bill, and then their refusal to pay may be considered as a refusal by him, in which case no notice could be necessary. At any rate, however, in the present case, the want of notice can be no defence, for the defendant had not, at the time when the bill became due, sufficient effects at the place appointed by him for the payment of it. The rule must, therefore, be refused.

Per Curiam,

Rule refused.

(a) 3 *Campb.* 145.

1821.

Wednesday,
January 24th.

REECE and Another *against* RIGBY, Gent.,
One, &c.

Where an attorney for the plaintiff suffered the case to be called on without previously ascertaining whether a material witness, whom the plaintiff had undertaken to bring into court, had arrived, in consequence of which the plaintiff was nonsuited: Held, that in an action against him for negligence, it was properly left to the jury to say whether he had used reasonable care in conducting the cause; and the jury having found in the negative, the Court refused to disturb the verdict.

ACTION against an attorney for negligence. Plea, the general issue. At the trial at the sittings at *Westminster*, after last *Michaelmas* term, before *Abbott C. J.*, it appeared, that the defendant had been retained by the plaintiffs, as their attorney, to commence and prosecute an action against a person of the name of *Clarke*, for a debt. In support of that case, one *Fermin* was a material and necessary witness. This person resided at *Colchester*; and, on the day before the cause was tried, *Reece*, one of the plaintiffs, who had previously directed the defendant not to subpoena *Fermin*, being informed by the defendant and his clerk, that the trial would come on the next day, undertook to take care to have *Fermin* at *Westminster* at the sitting of the Court, and directed the defendant to have the other witnesses ready. He then sent off a special messenger to *Colchester* for the witness. On the morning of the trial, all the other witnesses were in court, and the defendant then seeing the foreman of *Reece* there, enquired from him, whether *Fermin* had arrived, and was informed, that he had not seen him, but that he supposed he was arrived, and that he was getting his breakfast at some adjoining coffee-house. The defendant, upon this information, and without previously sending to enquire at any coffee-house in the neighbourhood, but relying on the assurance of *Reece* given the day before, suffered the cause to be called on. The plaintiffs on that occasion were
non-

nonsuited, in consequence of *Fermin's* absence. *Fermin* arrived in court about an hour afterwards, having, by some accident, been delayed on the road. The Lord Chief Justice left it to the jury to say, whether, under these circumstances, the defendant had used reasonable care and diligence in not previously ascertaining whether the witness had arrived; and in case he had not arrived, in not withdrawing the record. The jury found a verdict for the plaintiffs. And now,

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against
RIGHT.

Scarlett moved for a new trial. In this case, the plaintiff *Reece* himself was the person really in fault; for he had undertaken that the witness should be in court in time to give evidence; there was, therefore, no negligence on the part of the attorney. Besides, at all events, he can only be liable for gross negligence; and here that cannot be said to have been the case; for at the most, it was an error in judgment, in calculating between two evils, viz. the withdrawing the record, by which the plaintiffs must have sustained a certain loss; and the chance of a nonsuit, in case the witness did not appear, which, from the account given by the plaintiff's foreman, he had no great reason to apprehend would be the case. This cannot, therefore, be considered as gross negligence.

ABBOTT C. J. It seems to me that it was properly left to the jury to determine, whether there was, on this occasion, reasonable care used by the attorney or not. They have found, that reasonable care was not used, and I cannot say that their verdict is wrong. It was the duty of the defendant not to suffer the case to be called on, unless he had previously ascertained that

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REECE
against
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all his witnesses were present; and, at the time when this case came on, it must have been wholly uncertain whether *Fermin* had arrived. As to the enquiry from the plaintiff's foreman, it was obvious that he knew nothing personally of the matter; and the defendant neglected to make any enquiries at the adjacent coffee-houses, which, if he had done, he would have found that the witness had not arrived: he might, then, have withdrawn the record. There is, therefore, no ground for disturbing the present verdict.

Per Curiam,

Rule refused.

Thursday,
January 25th.

PRUESSING *against* ING.

A promissory note for the payment of 50*l.* at three months after date, with interest from the date, requires a stamp applicable to a note not exceeding 30*l.*

DECLARATION on a promissory note, by which the defendant promised to pay to the plaintiff, three months after the date thereof, 30*l.*, with lawful interest from the date thereof. At the trial before *Holroyd J.*, at the last *Middlesex* sittings, it appeared upon the production of the note that it was written on a stamp applicable to a 30*l.* note. It was then objected, that inasmuch as the note was given for 30*l.*, with lawful interest from the date thereof, it was in effect a security for 30*l.* and 7*s.* 6*d.*, three months' interest thereon; and therefore, within the 55 G. 3. c. 184. sched. part 1., was given for the payment of a sum exceeding 30*l.*, and ought to have had a stamp of 3*s.* 6*d.* The learned Judge directed the jury to find
a ver-

a verdict for the plaintiff, with liberty for the defendant to move to enter a nonsuit; and

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—
Promissory
against
Ira.

Chitty now moved accordingly, and urged the same arguments as were offered at the trial; and he cited *Cameron v. Smith* (a), to shew that where interest is reserved on the face of a bill it forms part of the debt, and therefore may be added to the principal, so as to constitute a good petitioning creditor's debt under a commission of bankruptcy. Here, the interest is expressly reserved on the face of the note, and the sum for which it was made payable is 30*l.* 7*s.* 6*d.*, the principal and interest. It ought, therefore, to have had a stamp appropriated to a note given for the payment of a sum of money exceeding 30*l.*; and he also cited *Israel v. Benjamin* (b), where this very point came under the consideration of the Court, and was not determined.

ABBOTT C. J. The stamp act imposes upon every promissory note for the payment, at any time exceeding two months after date, of any sum of money exceeding 20*l.*, and not exceeding 30*l.*, a duty of 2*s.* 6*d.*, and other duties upon other notes in proportion to the sums thereby secured. The object of the legislature was to impose a pro rata stamp duty upon the sum actually due at the time of taking the security, and not upon what might become due in future for the use of the money. The question, therefore, in this case is, what was the sum due at the time when the note was taken? For that is the sum secured. I am quite satisfied that the words "sum of money" in the act, mean the

(a) 2 *B. & A.* 305.(b) 3 *Campb.* 40.

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PAUKING
against
Ing.

principal sum mentioned in the note, and not a sum compounded of principal and interest. A contrary decision would be most mischievous, and have the effect of avoiding many securities; for it has been the constant practice, under similar provisions applicable to bonds in this and former stamp acts, to measure the stamp duty by the principal sum secured, although interest is always made payable from the date of the bond. think, therefore, that this rule ought to be refused.

Rule refused.

Thursday,
January 25th.

PITT *against* SHEW and Others.

In trespass the declaration was for taking goods, chattels, and effects: Held, that the plaintiff might recover the value of fixtures, under these words.

DECLARATION in trespass for breaking and entering plaintiff's dwelling-house, and for taking divers goods, chattels, and effects. Plea, not guilty. The defence relied upon at the trial was, that the defendants entered, on the 14th day of *April*, 1820, under a distress warrant for half a year's rent due to *Evans* and *Macklew*, as the assignees of *Adam*, a bankrupt; and that, on the 27th day of *April*, 1820, they sold the furniture, &c.; and that defence was made out in evidence. It appeared, further, that they had taken certain fixtures, the use of which had been demised by the lease under which the plaintiff held. *Abbott C. J.* was of opinion that these fixtures could not be by law distrained. As to the rest of the goods, he left it to the jury to say whether the defendants had sold within a reasonable time. The jury found a verdict for the plaintiff as to the fixtures, damages 5*l.* 10*s.*; and for the defendants as to the other parts of the case.

Gurney

Gurney now moved to enter judgment for the defendant, non obstante veredicto, on the ground that the plaintiff was not entitled to recover the value of the fixtures under this declaration, which charged the defendant with taking goods, chattels, and effects; and he cited *Niblet v. Smith* (a), where, in replevin for taking goods and chattels, to wit, one lime-kiln, and avowry for rent in arrear, the plaintiff pleaded in bar that the lime-kiln was affixed to the freehold, and therefore exempt from distress. To this plea there was a general demurrer; and the Court held, that the plea stating the lime-kiln to be affixed to the freehold was inconsistent with, and a departure from, the declaration, which treated it only as a chattel. The effect, therefore, of that case was, that fixtures do not come within the description of goods and chattels. So, in *Lee v. Risdon* (b), it was held by the Court of Common Pleas, that an action for goods sold and delivered would not lie for fixtures; and *Nutt v. Butler* (c) is to the same effect. Here, the plaintiff had possession of these fixtures under the demise, and the landlord might distrain them for rent.

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ABBOTT C. J. I am of opinion that the value of these fixtures may be recovered under the terms mentioned in the declaration, "goods, chattels, and effects." Fixtures may be taken in execution under a fieri facias, which contains similar words. They are not distrainable, not being severable from the freehold; and, for that reason, not being capable of being restored in the same plight in which they were before

(a) 4 T. R. 504.

(b) 2 Marsh. 495.

(c) 5 Esp. 176.

sever-

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 against
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severance. And, for the same reason, before the statute 11 Geo. 2. c. 19., growing corn could not be distrained.

Rule refused.

Same against Same.

A reasonable time after the expiration of five days from the time of distress is by law allowed to the landlord for appraising and selling the goods distrained.

THE plaintiff, in person, moved for a new trial, on the ground that there ought to have been a general verdict in his favour; because the defendants had remained upon the premises for too long a period, and had not immediately after the expiration of five days from the time of distress taken, appraised, and sold the goods, pursuant to the 2 W. & M. sess. 1. c. 5. s. 2., and 11 G. 2. c. 19. s. 10.

But the Court were clearly of opinion that it was lawful for the landlord, and those acting under him, to remain more than five days upon the premises, for the purpose of selling the goods distrained. By law he could not sell till five days had expired; and, taking the two acts together, it is clear that it must be left to the jury to say what is a reasonable time, after that period, within which to sell the goods; and the jury, in this case, having found that the defendants had sold within a reasonable time, there is no ground for disturbing the verdict.

Rule refused.

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HUNTER *against* KING.Friday,
January 26th.

THIS was an action against an attorney for negligence in the negotiation of an annuity. At the trial before *Holroyd J.*, at the last sittings after *Michaelmas* term, *Thomas Pike*, the grantor of the annuity, was called as a witness on the part of the plaintiff, to prove that the subscription of his name to the deed of covenant to secure the annuity was forged. It was objected at the trial, that without a release from the plaintiff, he was not a competent witness. The objection was overruled, and the plaintiff obtained a verdict; and now

In an action against an attorney for negligence in the negotiation of an annuity, the party who on the face of the deed appeared to be the grantor is a competent witness to prove it a forgery.

Denman moved for a new trial. This evidence was improperly received. There is no decision upon the point in any civil case; but in criminal cases it has been long settled, that a party by whom an instrument purports to be made is not an admissible witness to prove it forged, if he would either be liable to be sued upon the instrument, supposing it to be genuine, or thereby be deprived of a legal claim against another. In *Phillipps on Evidence*, chap. 5. sec. 6., the authorities upon this subject are collected. There is no distinction, in principle, between civil and criminal cases in this respect. Here, if *Hunter* recovered the whole value of the annuity against the defendant, he never could sue *Pike* on the deed; for the verdict obtained in this action would be evidence in such an action, by *Hunter* against *Pike*, to shew that *Hunter* had received no damage.

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ABBOTT C. J. I am of opinion that this evidence was properly admitted. The case of forgery has always been considered an anomaly in the law of evidence. The question, however, in civil cases is, whether the witness has any interest in the verdict. Now, if *Hunter* brought an action against *Pike*, the latter could not by plea avail himself of this verdict, because it is *res inter alios acta*; and if it could not be pleaded in bar, it would not be admissible in evidence in such an action. In actions against the sheriff for an escape upon *mesne process*, sometimes the whole debt is recovered against the sheriff; yet, in an action against the original debtor for the debt, he could not plead in bar, or give in evidence, in reduction of damages, the judgment obtained in the action against the sheriff. I am therefore of opinion, that as *Pike* could not, in an action brought by *Hunter* against him upon the annuity deed, avail himself of this verdict, he has no interest in it; and, consequently, that he was a competent witness to prove the forgery.

Rule refused.

Friday,
January 26th,

TODD against REID.

An insurance broker is only entitled to receive payment for the assured from the underwriter in money; and, therefore, a custom to set off the general balance due from the broker to the underwriter in the settlement of a particular loss is illegal.

THIS was an action by the assured against an underwriter, tried before *Abbott C. J.*, at the *London* sittings after *Michaelmas* term. The only question was, whether the loss had been paid. The assured had employed one *Power*, a broker, to effect the policy, which he returned to the assured. Some time after the loss happened, the assured sent the policy to him for the purpose of adjusting the loss, and receiving from the under-

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underwriters the amount of their several subscriptions. The policy was adjusted by the defendant, and part of the sum for which he had subscribed the policy was duly paid over to the plaintiff. At the time of settling the loss, the broker was indebted to the underwriter for premiums on other policies of assurance, but to which the plaintiff was not a party, in a sum equal to the residue of the money due on the policy in question; and this sum was allowed in account between the broker and the underwriter; and it was contended that this was to be considered as payment to the assured to that amount. It was proved at the trial, that it had been the practice at *Lloyd's* coffee-house, for many years, thus to settle 'losses between the broker and the underwriter. The Lord Chief Justice was of opinion that such a usage could not be supported in law, that the broker had only authority to receive payment in money from the underwriter; and the plaintiff recovered a verdict. The Solicitor-General now moved for a new trial, and contended that this money so allowed in account between the broker and underwriter might, in consequence of the usage which had so long obtained at *Lloyd's* coffee-house, be considered as payment to the assured. If this were not payment, all that the underwriter would have to do, would be, first, to require payment of the balance due to him from the broker in money; and then to return it to him, together with the residue.

Per Curiam. The broker, as agent of the assured, was only entitled to receive payment in money; and no usage can sanction such a practice as that which is stated to have prevailed in this particular business. This is, in fact, an attempt to pay the debt of one person with the money of another.

Rule refused.

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Friday,
January 26th.

EDWARDS *against* DICK.

In an action against the drawer of a bill payable at a particular place, it is no defence that no notice of the dishonour has been given to the acceptor; nor is it any defence that the bill was accepted for a gaming debt, if it be indorsed over by the drawer for a valuable consideration, to a third person, by whom the action is brought.

ASSUMPSIT by plaintiff as indorsee, against the defendant as drawer and indorser of a bill of exchange. The bill was dated *December 1. 1819*, and was drawn by defendant upon, and accepted by, Lord R., for the sum of 240*l.*, payable at three months, at Mr. *Newland's* chambers, *New Inn*. Plea, general issue. At the trial at the sittings after last *Michaelmas* term, before *Bayley J.*, it appeared that the bill had been duly presented and dishonoured; but no notice had been given to the acceptor of its dishonour. It was also proved that it had been drawn and accepted in discharge of a debt for money won at play, but that the plaintiff had received it from the drawer in payment of a bona fide debt. The learned Judge was of opinion that neither of these circumstances formed any defence to the present action; and the plaintiff obtained a verdict. And now

F. Pollock moved (by leave of the learned Judge) to enter a nonsuit. First, notice of the dishonour ought to have been given to the acceptor; for he is primarily liable, and every thing ought to have been done to have enabled the party to have charged him. And, in *Treacher v. Hinton*, which was tried before *Abbott C. J.*, at the sittings after last term, and in *Young v. Rowe (a)*, in the House of Lords, it seems to have been considered that such notice was necessary, in order to charge the acceptor. On the second point, the words of the statute 9 *Ann. c. 14. s. 1.* are very strong; for the bill or other security

(a) 2 *Brod. & Bing.* 165.

is thereby, if given for money lost at play, void to all intents and purposes whatsoever. It must be, therefore, as if no bill had ever existed. For if the present plaintiff be permitted to recover, the bill will not be void to all purposes, but will for this purpose be valid. In *Bowyer v. Bampton* (a), such a bill was held to be void in the hands of an innocent holder, who had given a valuable consideration for it. The cases under the statute of usury are similar to the present. Under that act, in *Ackland v. Pearce* (b), it was held; that a bill of exchange is void in the hands of a bonâ fide indorsee, if drawn in consequence of an usurious agreement for discounting it, although the drawer to whose order it was payable was not privy to the agreement. He also referred to *Wilmot's Notes*, p. 194., for the general principle upon which statutes are to be construed.

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ABBOTT C. J. This is an action by the indorsee of a bill of exchange, against the drawer and indorser. The indorsee received the bill for a good and valuable consideration: upon the view of the bill at the trial, it appeared that it was accepted payable at a particular place; proof was given of a demand at that place, but there was no notice of the non-payment given to the acceptor; and it is contended, that this is an answer to the present action. The argument, however, assumes that if an action had been brought upon the bill against the acceptor, it would have been necessary to give such proof; and we have been referred to a case of *Treacher v. Hinton*, where a rule nisi for a new trial was granted, in the course of this term. In that case, however, the plaintiff

(a) 2 Str. 1155.

(b) 2 Campb. 599.

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had been nonsuited by me in consequence of no such proof having been given, and the granting of the rule nisi is therefore a proof, if at all, that the opinion of the court is adverse to such an objection. But it would not follow that because the acceptor, if sued, could make such an objection, that the drawer may take advantage of it. For it is quite sufficient if notice of the dishonour be given to the party against whom the action is brought, and he can not allege the want of notice to a third person. The first objection therefore fails. But a second point has been made in the present case, founded on the provision contained in the statute 9th *Anne*, c. 14. s. 1., which enacts, that "all notes, bills, bonds, judgments, mortgages, or other securities, or conveyances whatsoever, given, granted, drawn, or entered into or executed by any person or persons whatsoever, where the whole or any part of the consideration of such conveyances or securities shall be for any money or other valuable thing whatsoever won by gaming, &c. shall be utterly void, frustrate, and of none effect, to all intents and purposes whatsoever." Now this provision is certainly expressed in very large terms. But the object of the statute, to which we must look, in order to arrive at a clear construction of this clause, was to prevent excessive and deceitful gaming; and it was with that view that they enacted that the securities should be void to all intents and purposes. It is however argued, that if the plaintiff in the present case recover, this bill, the consideration for which was money won at play, will be valid to some purposes. But, I think we must understand the language of the legislature with reference to the object which they then had in view, viz. the prevention of gaming: and that will be effectually accomplished, by holding

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ing the securities to be void for any purpose of enforcing payment of the money won at play. The drawer, therefore, of such a bill of exchange cannot maintain any action against the acceptor. Now if he could, by passing the bill to a third person, enable him to sue the acceptor, that would be within the mischief of the act. It follows, therefore, that no person deriving title through the drawer, can be in a different situation from him so as to sue the acceptor. The case of *Bowyer v. Bampton* falls within this rule; for there the action was brought against the loser, to recover money lost at play, and the Court properly held that the action would not lie. The cases on the statute of usury follow the same principle. In the case of *Ackland v. Pearce*, the acceptor, who wanted to borrow money, applied to the drawer, who drew a bill for 386*l.*, which was passed away by the acceptor, for an usurious consideration, and afterwards fell into the hands of a third person, by whom the action was brought against the drawer; but in that case substantially, the drawer and acceptor were the same persons, and the plaintiff claimed in effect, though not in form, through the persons affected by the usurious contract. But there is no case upon the statute of usury, where a drawer, after having parted with a bill for a good consideration, can afterwards set up as a defence an antecedent usurious contract between himself and the acceptor. For if so, a court of justice would enable him to commit a gross fraud upon an innocent person. Upon the whole, I am of opinion, that we shall best effectuate the intention of the legislature, by saying that this bill is void for every purpose which it was the object of the statute 9 *Anne*, c. 14. s. 1. to prevent. No person, therefore, who derives his title through the

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winner, can make the loser pay. But for the purpose of preventing fraud, we cannot permit the defendant to set up his own gaming as a defence; and therefore I think that the words of the statute do not extend to the present case, and that this rule ought to be refused.

BAYLEY J. In this case, the defendant had notice of the dishonour of the bill; and I am of opinion that he cannot be protected by want of notice to the acceptor, by which he himself could not be prejudiced. As to the second point, I am of opinion that this case does not fall within the purview of the act. Any security by which payment is to be enforced from the loser in case of gaming, or the borrower in the case of an usurious loan, is void; but no such effect can be produced by the plaintiff's recovering in the present action. And it would be most unjust to allow this defence to a defendant, who having indorsed over, and thereby asserted the bill to be valid, afterwards, when called upon to pay it, says that it is invalid, and that in consequence of fraudulent conduct to which he himself has been a party.

HOLROYD J. I am of the same opinion. The rule of law is, that the words of a statute are not to be construed so as to extend beyond the mischief contemplated by the act, where such construction would be injurious to the interest of third persons. That would be the case here, if we were to hold this to be a good defence; for this being an action against the drawer, the winner of the money, it would be contrary to the intent of the statute that he should be protected, for in that case he would be enabled to keep the money won at play contrary to the intent of the statute. No doubt, in this case, the
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acceptance is void ; for it was given in consideration of money lost at play. But the consideration given by the present plaintiff when the bill was negotiated was not of that description ; and I think the object of the statute will be best answered in the present case, by holding that the words extend only to make the acceptance void. But it is urged, that the words of this statute are imperative, and undoubtedly they are very strong. It has, however, been long settled upon the construction of the 13 *Eliz. c. 10. s. 3.* as to ecclesiastical leases, that words full as strong as these may be so narrowed as not to extend beyond the mischief contemplated by the act. That statute directs, that “all the leases therein specified shall be utterly void and of none effect, to all intents, constructions, and purposes ;” and yet it has been held, that a lease by a dean and chapter, although within the act, is good during the life of the dean ; and even after his death it is not absolutely void, but only voidable, and may be confirmed by his successor. There the courts have looked to the object of the statute, which was to prevent the impoverishing of the successor. So, here, we ought to put a similar construction on the words of the present act ; and by so doing we shall not do an injustice to an innocent party, nor protect an individual whom it was the intention of the statute to prevent from obtaining money by means of gaming.

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BEST J. This is a most iniquitous defence. The defendant desires the Court to prevent the plaintiff from recovering ; and, for that purpose, alleges his own fraud in his defence. I am, however, quite satisfied that the view taken of the case at the trial, by my Brother

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Bayley, was correct. The policy of the statute of *Anne* was to prevent any security given for the payment of a gaming debt, being enforced against the loser; and therefore neither the drawer, nor any person claiming under him, can maintain such an action as the present against the acceptor. What is said by Lord C. J. *Wilmot*, to which we have been referred, only applies to cases within the policy of any particular statute. This case, however, is not within the policy of 9 *Ann. c. 14*. If we were to hold this to be a good defence, we should indeed violate the policy of the statute, by enabling the defendant to keep in his pocket the money won at play; and, by so doing, we should construe the statute so as to encourage, and not to repress, excessive and deceitful gaming. I think, therefore, that this rule ought to be refused.

Rule refused.

Monday,
January 28th.

The KING *against* CLEMENT.

A court of general gaol delivery has the power to make an order to prohibit the publication of the proceedings pending a trial likely to continue for several successive days, and to punish disobedience to such order by fine.

A RULE nisi had been obtained in last *Trinity* term, calling upon the justices of the delivery of the gaol of *Newgate*, to shew cause why a writ of certiorari should not issue, directed to them, to remove into this court all orders made at the last *April* session of gaol delivery holden for the county of *Middlesex*, by adjournment, at Justice-hall in the *Old Bailey*, in the suburbs of the city of *London*, concerning *William Innell Clement*;

Service of an order of such court, calling upon the editor of a newspaper "to answer for contemptuously publishing such proceedings," at the office at which the newspaper was published, is good service within the 38 G. 3. c. 78. s. 12.; and the editor not having appeared, the fine was held to be properly imposed upon him in his absence.

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and also the order contrary to which, it was stated in and by a certain other order made by the said Justices, at the delivery of the said gaol of *Newgate*, holden for the county of *Middlesex*, by adjournment, at Justice-hall aforesaid, on *Tuesday* the 25th day of *April* last, that the said *William Innell Clement* did print and publish the trials of *Arthur Thistlewood* and *James Ings* for high treason. The following facts were disclosed in the affidavits in support of the rule.

On *Monday* the 17th day of *April*, 1820, *Arthur Thistlewood* was put upon his trial at the *Old Bailey*, upon an indictment for high treason; and Lord Chief Justice *Abbott*, then being one of the justices before whom *Thistlewood* was tried, before the commencement of the trial, stated publicly, that as there were several persons charged with the offence of high treason by the same indictment, whose trials were likely to be taken one after another, he thought it necessary strictly to prohibit the publishing of any proceedings of that or any other day, until the whole trial should be brought to a conclusion; and that it was expected that all persons would attend to that admonition. The trial of *Thistlewood* was concluded on *Wednesday* the 19th of *April*, and *James Ings* was afterwards tried for and convicted of the same offence, on *Saturday* the 22d of *April*. On the *Sunday* following, the defendant published, in the *Observer* newspaper, a fair, true, and impartial account of the proceedings and evidence publicly had and produced in open court, on the trials of *Thistlewood* and *Ings*. The defendant's affidavit further stated, that on *Tuesday* the 25th *April* he left *London*, and after visiting several places in the county of *Kent*, arrived at *Feversham* on *Friday* the 28th *April*; and that on the following day

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he saw in a newspaper an account of the sentences passed on the prisoners; and that he had been ordered by the Court to pay a fine of 500*l.*, for a contempt of court, in printing and publishing the account of the said trials. He positively swore, that this was the first intimation he had had of any steps having been taken against him for the alleged offence. He then immediately left *Feversham*, and arrived in *London* on *Saturday* the 29th *April*, and was then informed, that on *Wednesday* the 26th day of *April*, the following order had been served at his office in the *Strand*: “On the motion of Mr. Attorney-General, and on reading the affidavits therein mentioned, it is ordered, that *William Innell Clement*, the printer, publisher, and proprietor of a certain newspaper called the *Observer*, do attend this court on *Friday* next, the 28th instant, at the hour of nine in the morning, precisely, to answer for unlawfully and contemptuously printing and publishing in the said newspaper the trials of *Arthur Thistlewood* and *James Ings* for high treason, pending the proceedings against *John Thomas Brunt*, and others, who were included in the same indictment with the said *Arthur Thistlewood* and *James Ings*, for the same high treasons, contrary to the order of this Court, and to the obstruction of public justice.”

The *Attorney* and *Solicitor-General*, *Gurney*, and *Littledale*, now shewed cause. The Court will not grant a certiorari, to remove the proceedings of an inferior court, unless there appears to have been some irregularity or impropriety in the proceedings of that court. In his case the proceedings were perfectly regular and proper. For the court of general gaol delivery had au-
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thority to make the original order, prohibiting the publication of the proceedings. That is established by all the precedents applicable to this subject. In *The King v. Watson*, which was an indictment for high treason, tried in this court in *Trinity* term 1817, a similar order was made; and upon a complaint by the counsel for the prisoner, that that order had been disobeyed by the editor of a newspaper, the Court asked the prisoner's counsel, whether he made any application to the Court upon the subject, and upon his answering in the negative, the Court stated, that it was then unnecessary for them to do any thing; but no doubt was intimated as to their power of enforcing the order. And in *The King v. Brandreth* and others, which was an indictment for high treason, tried before a special commission at *Derby*, in 1817, there was a similar order made by the Court. That order was infringed, and the counsel for the prisoner mentioned the subject to the Court, but declined making any application to the Court to punish the editor of the newspaper, and, of course, the matter dropped. Besides, a publication, the effect of which is likely to prevent or obstruct the course of public justice, has always been held to be a contempt of the Court. In the *Practical Register in Chancery*, page 99., it is stated, that "contempt is a disobedience of the Court, or an opposing or despising the authority, justice, or dignity thereof: it commonly consists in a party doing otherwise than he is enjoined to do, or not doing what he is commanded or required by the process, order, or decree of the Court." In *Pool v. Sacheverell* (a), the question in the cause was, as to the validity of a marriage; and it was there held, that inserting an adver-

(a) 1 Peere W. 675.

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tisement in the public prints, that whoever should discover and make legal proof of the marriage in question should have 100*l.* reward, was a contempt of the Court; and the party procuring it was committed. The Lord Chancellor, in that case, said, "This tends to the suborning of witnesses, is very dangerous, and not only greatly criminal, but is a contempt of the Court, being a means of preventing justice in a cause now depending." That case establishes, that a contempt may be committed by a person out of court, pending a proceeding in court. In 2 *Atkins*, 471., a motion was made against the printers of the *Champion*, and the *St. James's Evening Post*, that they might be committed for publishing a libel against Mr. *Hall* and Mr. *Gardner* (executors of *John Roach*, Esq., late Major of the garrison of *Fort St. George* in the *East Indies*), and for reflecting likewise upon Governor *Mackray*, Governor *Pitt*, and others, taxing them with turning affidavit-men, &c. in the cause then depending in the Court of Chancery, between Mrs. *Roach* and the executors. It was insisted that the publishing of such a paper was a high contempt of the Court. The Lord Chancellor said, "There are three different sorts of contempt. One kind of contempt is, scandalizing the Court itself. There may be, likewise, a contempt of Court, in abusing parties concerned in causes here. There may be, also, a contempt of this Court, in prejudicing mankind against persons before the cause is heard. There cannot be any thing of greater consequence than to keep the streams of justice clear and pure, that parties may proceed with safety both to themselves and their characters." He then mentions a case, where it was held that the printing of a brief before the cause comes on was a contempt; and
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upon this he says, "The offence did not consist in printing, for any man may give a printed brief, as well as a written one, to counsel; but the contempt of this Court was prejudicing the world with regard to the merits of the cause, before it was heard." Lord *Hardwicke* was therefore of opinion, that it was of the utmost importance in proceedings in courts of justice to prevent all prejudice, as far as the Court can prevent it, from being excited against the parties before the court, pending the proceedings. Now, nothing could be more prejudicial to parties jointly indicted for a crime, and therefore probably likely to be affected by the same evidence, than that, pending the proceeding, (which necessarily was protracted for several days,) there should be published to the world that evidence which had already produced the conviction of one or two of the parties indicted. This was therefore a contempt, from its tendency to prejudice the minds of the public and the jurors who were to try the other cases; and it comes directly within the law laid down by Lord *Hardwicke*. In *Ex parte Jones (a)*, Lord *Erskine* fully recognises the authority of these cases; and he says, that "whatever may be said as to a constructive contempt, through the medium of a libel, against persons engaged in controversy in the court, it never has been or can be denied, that a publication not only with an obvious tendency, but with the design to obstruct the ordinary course of justice, is a very high contempt." These authorities establish incontrovertibly, that a publication out of court of any thing contrary to the order of the court, or which is likely to impede the course of public justice in the proceeding then pending in that court, is a con-

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(a) 13 Ves. jun. 257.

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tempt. It is not necessary that the party should be present at the time the fine is imposed. The circumstance of the party having been summoned to attend, and not attending, is sufficient. A high constable or a juror not attending, are frequently fined for their non-attendance. In *The King v. The Sheriff of Middlesex* (a), the under sheriff disobeyed the order of the Court, by refusing to amend the pannel of the grand jury. The high sheriff, in consequence, was ordered to attend; but did not, and was fined 100*l*. The fine having been estreated into the Exchequer, an application was made to this Court for a certiorari; but it was refused. It was not, however, insisted that the Court had not the power to fine, merely because the high sheriff was absent. Besides, it is clear from the defendant's affidavit, that he knew of the order. It may be said that this proceeding is irregular, because there was no personal service of the order of the 26th *April*. That objection, however, does not apply here; because, by the 38 *Geo. 3. c. 78. s. 12.*, it is expressly provided, that "service at the house or place mentioned in the affidavit left at the stamp-office, as the house or place at which such newspaper to which any proceedings civil or criminal shall relate, is printed or published, or intended so to be, of any legal notice, summons, subpoena, rule, order, or process, of what nature whatsoever, or to enforce an appearance in any suit, prosecution, or proceeding, civil or criminal, against any printer, publisher, or proprietor of any such newspaper, shall be deemed and taken to be good and sufficient service thereof, respectively, against all persons named in such affidavit or affirmation, as the proprietor or proprietors, pub-

(a) *Sir T. Jones*, 169.

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lisher or publishers, or printer or printers, of the newspaper mentioned in such affidavit or affirmation." Here it is expressly admitted upon the affidavits, that the order was served at the *Observer* office in the *Strand*. This statute, therefore, removes any objection on the ground of a defective service.

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Denman and *Platt* contra. A publication containing a fair and impartial account of the evidence given pending a proceeding does not tend to obstruct the course of public justice. By the constitution of the country, courts of justice are open to the public. If indeed any matter comes before the Court in which it is necessary, for the purposes of justice, that particular witnesses should be examined separately; in such a case, which appertains strictly to the business immediately before them, the Court have a right to exclude those parties for that cause; but they have no power to exclude those to whom that reason does not apply. It would be illegal to shut their doors against spectators. No real obstruction of justice can arise from a publication of a true and faithful account of the proceeding. The public good is to be considered; and it is for the public benefit that a faithful account should be published of a transaction of which they might otherwise receive only a garbled account from the mouths of individuals. Such a publication has the effect of increasing, as it were, the size of a court of justice. It brings to the knowledge of others, not personally present, the facts as they really exist. In order, however, to shew that a publication pending the trial may obstruct public justice, it is said that the jurors who were to try the subsequent cases might be prejudiced by reading the evidence already given. It is the duty, however, of those

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those jurors to attend during all the trials, in order to be ready when called upon, and in that case they must of necessity hear the evidence given upon each trial, and imbibe all the prejudice likely to arise from the effect of that evidence on their minds. As to the prejudice on the public, it is impossible to prevent those who are present at the trial from communicating to their friends and others the effect of what they have heard; and it is better that that should be done by means of a correct publication of the proceedings than by a garbled account. It is of great advantage to the prisoner that the proceedings should be published daily; for if a falsehood sworn to by a witness appear in the public prints the next day, the reading of such evidence may induce a person capable of giving a contradiction to come forward in favour of the prisoner. If the witness himself knows that his evidence will be concealed, until the whole inquiry is concluded, he may give false evidence without any fear of detection: but if, on the other hand, he knows that his evidence will be published almost immediately, the fear of detection may operate upon his mind, so as to prevent his uttering a falsehood. Publicity, therefore, is most conducive to the due administration of justice; and that being so, the Court had no power to make an order to prohibit that which was not an obstruction, but a furtherance of public justice. If, indeed, they had the power to prohibit the publication for a time, they would equally have the power to prohibit it for ever, or they might even prohibit individuals from communicating in conversation what they hear in court. Assuming, however, that the original order was lawfully issued, a court of general gaol delivery has no means of enforcing obedience

ence to such an order by fine, for they have no process to bring the parties before them. The order served at the printing-office is in the nature of mesne process, and there is no precedent of such an order having ever issued from a court of this description. They may indeed have the power of bringing before them persons whose presence is necessary to enable them to carry on the business with which they are entrusted, such as a sheriff, a juror, a constable, a witness, or a prosecutor; but it does not thence follow, that a court has authority to call before them a person who is a stranger to the whole proceedings; and if this court of gaol delivery have such power, it follows, that it equally belongs to a court of quarter-sessions, or a court-leet. Allowing such a power to inferior courts would be attended with dangerous consequences. The authorities cited on the other side only establish, that the superior courts of *Westminster Hall* have the power of punishing contempts by process of attachment. There is no instance in which any court of quarter-sessions, any court of assize, any court of special commission, have ever summoned a party to answer, and afterwards attached him in his absence, and issued process of contempt against him, because he did not appear. It does not follow, because a court have the means of removing obstructions, that therefore they have a power to issue any order whatever, as to individuals who do not belong to the court, and who are not present. As to the case cited of the sheriff, it is his duty to attend the court, and his absence alone, therefore, is a proper subject of a fine; and if any improper practice has taken place in the panel of jurors, that would operate as an additional cause of fine; but still it would be imposed upon an individual whose duty it is to attend the court.

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court. So a juror summoned to attend may be fined for his absence, or for any act inconsistent with his duty. *The King v. Bushel* (a) is an authority to shew that the Court may inquire into the nature of the contempt. The first instance where any order was ever made to prevent the publishing of the proceedings pending a trial was on the impeachment of Lord *Melville* in 1806; and similar orders were made in *The King v. Watson*, in this court, and in *The King v. Brandreth*, which was tried at *Derby*. In the two latter cases, there was an infringement of such orders by the editors of some of the newspapers; but no attempt was made to punish the contempt by a fine. If, in this case, the publication had taken place in *Surrey* instead of *Middlesex*, the Court clearly would have had no jurisdiction to punish the contempt. The next objection is, that this order ought to have been personally served on the defendant, for that is the invariable practice in the superior courts, in cases of attachment. Supposing, however, the service to have been sufficient, the Court had no power to proceed to fine until appearance. In *Griesly's* case (b), a distinction is taken between contempts committed out of court and contempts committed in court. In respect to the latter, it is said, that the steward of the court-leet may take cognizance of them, and impose a fine; but of the former, the jurors of the leet have power to present them, and assess an amercement.

ABBOTT C. J. Although I was a party to this act of the Court below, I hope I should not be the less willing to rescind what had been done in this case, if I thought

(a) *Vaughan Rep.* 136.(b) 8 *Co. Rep.* 38.

it was improperly done, than I am, where an application is made for a new trial, in case of a misdirection by me. I think it sufficient now to state, that I have heard nothing upon the present occasion, which induces me even to doubt the propriety of what took place in the court below, and, therefore, I think that this rule ought to be discharged.

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BAYLEY J. I am of the same opinion. In order to induce the Court to grant this application, it must appear that there is a reasonable degree of doubt as to the legality of the order made by the Court below. For the object of this application is not to enable the defendant to have a writ of error, but only that he may ultimately have the opinion of this Court on the validity of the order; and, by refusing this application, we do not in fact deprive him of an opportunity of contesting that point in the Court of Exchequer. That ground for the application, therefore, altogether fails. As to the validity of the order, it was contended in argument, first, that the Court had no power to make an order prohibiting the publication of these trials pending the proceedings. Now, in order to judge of that, it becomes necessary to consider what the nature of the proceeding was. An indictment had been found against a number of individuals for the crime of high treason, and they were then about to be tried. The whole trial of all these individuals constituted one entire proceeding; for if they had not severed in their challenges, the prisoners would have been tried all at once. In point of fact, however, they did sever in their challenges, and were tried seriatim. It could not, therefore, be said that the whole proceeding was terminated, until the last of those prisoners had taken his trial.

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Now the court before whom the trial was about to take place was a court of general gaol delivery, and had authority to make any order which they might judge to be necessary, in order to preserve the purity of the administration of justice in the course of the proceeding then depending before them, and to prohibit any publication which might have a tendency to prevent the fair and impartial consideration of the case. On the present occasion, it occurred to the Court that it would be of great importance, with a view both to the interest of the prisoners and that of the public, that a publication like the present should be prohibited until after the termination of all the trials; and if this had not been done, many inconveniencies might have followed, some of which may be pointed out. By the necessary course of the proceeding, it must inevitably happen that the evidence would be repeated in each trial; and if, upon the first trial, one or more of the witnesses had been of doubtful character, it might have been of the utmost importance to keep them apart from the rest, and to examine carefully whether, upon each successive trial, they continued to give the same account which they did upon the first. Now, all this would be prevented, if, by a publication like the present, such persons were enabled to see a printed account of the trial, and to read over, not only their own evidence, but also that of the other witnesses who had been examined. This would give them an opportunity of explaining those parts of their statement which might be at variance with the other facts proved in the case. But, it is argued, that if the Court have this power of prohibiting publication, there is no limit to it, and that they may prohibit altogether any publication of the trial. I think

think that that does not follow. All that has been done in this case is very different ; for the prohibition, here, has only been till the whole trial was completed. Supposing, however, that this was a legal order, it is then argued that the defendant was not personally served with the order of the 25th of *April*, by which he was required to appear on the 28th of *April*, to answer for his breach of the original order ; and that, for that reason, the Court had no jurisdiction to impose this fine. The defendant, in his affidavit, only states that he went out of town on the 25th of *April* ; but he does not say that he was not cognizant of the original order of the Court, nor does he deny that he went out of town with a view to avoid the consequences of his disobedience to it. But that is not all ; for it appears that, on the 26th, the notice was served at the place where his newspaper was published ; and, by 38 G. 3. c. 78. s. 12., that is sufficient. Besides, the rule which requires personal service, in order to ground an attachment, is merely a rule of practice, of which every court judges for itself. If the absence of a party be voluntary, he cannot complain that the proceeding has taken place behind his back ; for he might have attended, if he had pleased. The defendant does not, in his affidavit, give any reason for absenting himself. As to the question, whether a court of record has a power to fine a party who is not then present before them, but who has been guilty of a contempt, I entertain no doubt ; for, otherwise, his contempt in not appearing before them, would prevent his being punished for the previous contempt of which he had been guilty. It has been said, that the party may be punished by indictment ; but that is not always an

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effectual remedy; for then the evil will have been accomplished before any indictment can be tried; and, in such cases, it is fit that the party should be deterred by a speedy punishment. It seems to me, that the court below had authority to make the original order, and to punish the disobedience to it; and that they might proceed to do this in the case of an individual not personally present before them, it being established that he had had legal notice, and that his absence was voluntary. I think, therefore, that this rule must be discharged.

HOLROYD J. I am also of opinion that this rule ought not to be made absolute. In order to sustain the present application, a reasonable ground of doubt as to the legality of the order, should be presented to the Court. None such having been presented to my mind, I think we ought not to grant the certiorari, particularly in a case in which, if the order imposing the fine has been illegally made, the party injured may make his defence in the Court of Exchequer. This was an order made in a proceeding, over which the Court had judicial cognizance: the subject matter, respecting which it was made, was then in the course of judicature before them. The object for which it was made was clearly, as it appears to me, one within their jurisdiction, viz. the furtherance of justice in proceedings then pending before the Court; and it was made to remain in force so long, and so long only, as those proceedings should be pending before them. Now, I take it to be clear, that a court of record has a right to make orders for regulating their proceedings, and for the furtherance of justice in the proceedings before them, which are
to

to continue in force during the time that such proceedings are pending. It appears to me, that the arguments as to a further power of continuing such orders in force for a longer period, do not apply. It is sufficient for the present case, that the Court have that power during the pendency of the proceedings. This order was made to delay publication only so long as it was necessary for the purposes of justice, leaving every person at liberty to publish the report of the proceedings subsequently to their termination. I am therefore of opinion, that this was an order which the Court had the power to make. The next question is, whether the Court below had the power to fine. It is perfectly clear, as to the courts at *Westminster*, that contempts may not only be in the face of the court, but that they may be committed out of the court. In the argument of *Wilmot* C.J., in *The King v. Almon* (a), he shews clearly that publications libelling the superior courts, may be punished as contempts. The cases cited in argument from *Atkyns*, as well as that before Lord *Erskine*, establish, that any thing done either for the purpose of obstructing justice, or which will have that effect, may be punished as a contempt of the court before whom the proceedings are had. Courts inferior to the courts of *Westminster*, may clearly fine and imprison for a contempt, if they are courts of record, as the court of quarter sessions, and the court of oyer and terminer. Indeed, it is the constant practice for those courts to fine jurors who do not attend. Now, the ground on which a person nominated as a juror is bound to attend, is by reason of his having been summoned, and not merely by reason of his nomin-

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(a) *Wilmot's Notes*. 243.

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ation; for when the service is proved by the officer, the juror is fined in his absence for his non-attendance. If he can afterwards shew that he has not been summoned, he may come to the court and claim relief. That is not the case here, where the party has had an opportunity of being heard; for I think the statute of the 38 G. 3. makes service at the office good service, for this particular purpose. If that had not been so, the party might have applied at the subsequent sessions, and he would have been let in to urge any ground of relief or defence that he might have had. As to the argument of this being a dangerous power, it is true that every power may be abused; but the law and constitution of *England*, whenever that has been the case, has afforded a remedy for such abuses. An argument derived from the possible abuse, does not prove that the power itself is illegal. I think, therefore, that this rule should be discharged.

BEST J. I was present when the order in question was made; and I have heard the arguments which have now been urged against the propriety of that order. Following the example of my Lord Chief Justice, I shall content myself with saying, that nothing which has occurred in the argument this day, has induced me to doubt for a moment the legality or propriety of this order.

Rule discharged.

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The KING *against* The Inhabitants of CHAG-
FORD.

Saturday,
February 3d.

ON the 2d *December* 1816, two justices, by their order, removed *William Endacott*, with his wife and children, from *Chagford* to *Staverton*, both in the county of *Devon*. This order was on the same day suspended, on account of the illness of *William Endacott*. On the 1st of *July* 1817, the parish officers of *Chagford* believing the pauper sufficiently recovered to be removed, the following order was made by the magistrates: "Whereas it is now made appear unto us, the justices within named, and we are fully satisfied that the within order of removal may be executed without danger; we do, therefore, hereby order the same to be forthwith put in execution accordingly: And whereas it is duly proved to us, upon oath, that the sum of twenty-two pounds, seventeen shillings, and one penny halfpenny, hath been incurred by the suspension of the within order of removal; we do, therefore, order and direct the churchwardens or overseers of the poor of the parish of *Staverton*, to which parish the said *William Endacott* is ordered to be removed, to pay the said sum of 22*l.* 17*s.* 1½*d.* to *Richard Thorn* on demand." Immediately after this order was made, it was ascertained that the pauper was still too ill to be removed, and accordingly, on the seventh day of the same month, the justices signed a second order of suspension in the usual form. On the 16th *May* 1819, the pauper's father died at *Chagford*, and by his death two freehold houses in the parish of *Chagford*, descended

The power given to magistrates under 35 G. 3. c. 101. s. 2., of ordering the charges incurred during the suspension of an order of removal, to be paid by the parish to which the order is made, is confined to two cases only, viz. the death or removal of the pauper; and therefore, where a pauper, during the suspension of an order of removal, became irremovable in consequence of an estate descending to him: Held, that such a case was not within the act; and that the pauper, not having been removed, no order for the payment of any charges incurred during the suspension of the original order of removal, could be made.

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to the pauper, as heir at law. The parish officers of *Chagford* thereupon ceased to relieve the pauper and his family. On the 7th *February* 1820, another order was made, of which the following is a copy: “Whereas it is now made appear unto us, the justices named in the order of removal, and suspension thereof hereunto annexed, and we are fully satisfied, that such order of removal may be executed without danger; we do, therefore, hereby order the same to be forthwith put in execution accordingly. And whereas it is duly proved to us, upon oath, that the sum of sixty pounds and nine shillings hath been incurred by the suspension of the said order of removal; we do, therefore, order and direct the churchwardens and overseers of the poor of the parish of *Staverton*, to which parish the said *William Endacott* is ordered to be removed, to pay the said sum of sixty pounds and nine shillings to *Richard Thorn*, on demand.” The pauper was never removed, but on the 18th *February* 1820 the appellants were, for the first time, served with the order of removal, and with the several other orders hereinbefore mentioned, and on the same day payment was demanded of the several sums of 22*l.* 7*s.* 1½*d.* and 60*l.* 9*s.* as the expences incurred by the suspension. Against these orders, the parish of *Staverton* appealed, and gave the following notice. “Take notice, that we, the churchwardens and overseers of the poor of the parish of *Staverton* in the said county of *Devon*, do intend, at the next quarter sessions of the peace, to be holden at the castle of *Exeter* in and for the said county of *Devon*, to commence and prosecute an appeal against an order made under the hands of *Baldwin Fulford* and *George Gregory*, two of his majesty’s justices of the peace in and for the said county of *Devon*, and bearing date

date the 1st *July* 1817, so far as the same order directs the churchwardens or overseers of the poor of the parish of *Staverton* to pay the sum of 22*l.* 17*s.* 1½*d.* to *Richard Thorn*, as the sum incurred by the suspension of an order of the said *Baldwin Fulford* and *George Gregory*, for and concerning the removal of *William Endacott* and *Winifred*, his wife, *John Endacott*, *Mary Endacott*, and *Elizabeth Endacott*, their children, from and out of the said parish of *Chagford* into our said parish of *Staverton*. And also, take notice, that we, the churchwardens and overseers of the poor of the parish of *Staverton*, in the said county of *Devon*, do also intend, at the next quarter sessions of the peace to be holden at the castle of *Exeter* in and for the said county of *Devon*, to commence and prosecute an appeal against another order, under the hands of the said *Richard Fulford* and *George Gregory*, and bearing date the 7th day of *February*, 1820, so far as this order directs the churchwardens and overseers of the poor of the parish of *Staverton*, to pay the sum of 60*l.* 9*s.* to *Richard Thorn*, as the sum incurred by the suspension of the said order, for and concerning the removal of the said *William Endacott* and *Winifred* his wife, and the said *John Endacott*, *Mary Endacott*, and *Elizabeth Endacott*, their children, from and out of the said parish of *Chagford* into our said parish of *Staverton*. The sessions, on appeal, quashed both these orders, subject to a case for the opinion of this Court.

Nolan and *Tyrrell*, in support of the order of sessions. The two orders, against which the appeal in the present case is made, can only be supported under the authority of the 35 G. 3. c. 101. s. 2., by which it was enacted,

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enacted, that in case any poor person removed by virtue of any order of removal, should be unable to travel by reason of sickness, the justices making the order were authorised to suspend the execution of it; and the charges incurred by such suspension, might be directed to be paid by the parish officers of the place to which such poor person was ordered to be removed, in case any removal should take place, or in case of the death of such poor person before the execution of such order. Now, in the present case, neither of these events have happened; for the pauper is neither dead, nor has he been removed; and if the Court do not give a strict construction to the statute, it will be productive of great ambiguity and inconvenience. Besides, in the present case, a very long period of time has been suffered to elapse, without giving to the parish to which the order was directed any notice of its existence. In the interval, they may have lost the opportunity of obtaining evidence as to the pauper's settlement, or of applying to the sessions for an order of maintenance on his relations. It will be contended, on the other side, that this is within the mischief intended to be remedied by the 35 G. 3. c. 101.; but the words are expressly confined to two cases only. This, therefore, at all events, can only be considered as *casus omissus*. The notice only mentions the amount of the charges; but, under that, the whole merits of the case may be gone into. *Rex v. St. Mary-le-bone (a)*, and *Rex v. Kynaston. (b)*

Tancred, contra. The act of parliament in question, being a remedial law, ought to be extended to all cases

(a) 13 East, 51.

(b) 1 East, 117.

within

within the scope and mischief of it: for as penal laws, as, for instance, that of 13 *Eliz. c. 10. s. 3.*, are restrained to cases within the intent of the legislature, so, in like manner, remedial laws ought to be extended. The Court will not, in any case, require a nugatory act to be done; which would be the case here, if they were to hold, that in order to give the parish a right to recover the expenses incurred, the pauper must be removed, the only effect of which illegal act would be, that he would immediately return back to the parish from whence he was removed. In ordinary cases of removal, an actual removal of the pauper may be necessary; for, till that happens, the appellant parish has sustained no actual grievance. But, in suspended orders, the case is very different. There, the grievance accrues from the time of the making the order; and the parish to which the order is made has, in that case, two grounds of appeal: either that the pauper is not settled with them, or that the charges incurred by the suspension of the order of removal, are too great in amount. It cannot, therefore, be necessary, in order to raise the latter question, that any actual removal should be made. Besides, the very object of the act was to prevent an improper removal from taking place; and it is expressly enacted, that during the suspension of the order, the pauper should bring no additional burthen on the parish. But, if it be decided that, in this case, the order for the payment of the charges is not valid on account of the non-removal of the pauper, the suspension of the order will have brought an additional charge upon the parish. It is true, that the strict literal interpretation of the words, is against this view of the case; but so it was in

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in *Rex v. Everdon* (a), which turned upon the construction of this very act; and yet Lord *Ellenborough* there said, after deciding that an order of removal of a pauper might be suspended, though the pauper was not brought before the justices at the time of the order, "This is the plain sense and spirit of the act, though somewhat straining upon the words of it; but no other construction can be put upon them, consistently with the general object of the act." And *Grase J.* added, "The letter of the statute is sufficiently plain, according to the common understanding of the words; but that would militate so strongly against the spirit and object of it, that we cannot be governed by the letter, without entirely defeating this very wholesome law." The same inconvenience will occur here; for if the subsequently becoming irremovable during the suspension of the order, is to bring this charge upon the parish, the consequence will be, that parish officers will, in almost all cases, be anxious, notwithstanding sickness, to remove the pauper, lest such a burthen should be thrown upon them. There is another objection in the present case, which is, that the notice of appeal only raises the question as to the propriety of the charges. Now, that was fully proved, and is not negatived by the case. In *Rex v. St. Mary-le-bone*, there was an appeal both against the order of removal, and that for payment of the charges during its suspension.

ABBOTT C. J. In this case, we are called upon to put a new construction on this act of parliament,

(a) 9 *East*, 105,

which

which was passed in order to prevent a grievance arising from the too great temptation afforded to parish officers by orders of removal, to convey paupers from one place to another during sickness. The second section recites, that poor persons are often passed to the place of their settlement during the time of their sickness, to the great danger of their lives; and it gives a power to magistrates, in order to remedy this inconvenience, of not carrying their order into immediate effect, but of suspending its operation for a time. But then, in order to prevent this from producing any hardship to the removing parish, it provides, that no act done by the pauper during the suspension shall give him a settlement, and empowers the magistrates to order the intermediate charges to be paid by the parish to which the order is made, in case any removal shall take place, or in case of the death of such poor persons before the execution of such order. This power, however, seems to me to be confined to these two cases only, viz. the removal and death of the pauper. Whether or not it would have been expedient for the legislature to have provided for the present case, it is not for this Court to say. All that we can do is, to determine that the non-removal of the pauper prevents the case from falling within the act. I should have thought, indeed, that as the order of the magistrates, not being within the act, was altogether nugatory, the proper course for the sessions to have pursued would have been, not to have quashed the order, but to have dismissed the appeal. However, as they have done substantially right, I think their order ought to be confirmed.

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BAYLEY J. It might, perhaps, be the object of the legislature when this act of parliament was passed, to take away from parish officers the inducement of a hasty removal, by giving a power of recovering the charges incurred in all cases, including the present. But they have not said so, and the safest course for the Court is to abide by the words of the statute. Besides, in the present case, a very long period has elapsed, during which this order remained suspended, and no notice of it was given to the opposite party. Now, if that notice had been given, (and there are no words in the act that supersede the necessity of it,) it might have enabled the other parish to have made prompt inquiry, and to have ascertained the fact relative to the settlement of the pauper. I think, therefore, that this affords an additional reason for holding that the sessions have come to a right conclusion in this case.

HOLROYD J. This statute cannot, I think, be construed so as to apply to this case; although, probably, the legislature would, if it had occurred to them, have provided for it. The words used, however, are too express to include the present case. The cases under the statute of *Elizabeth*, as to ecclesiastical leases, are very different. There the words of the statute, being general, were restrained in construction, so as only to include leases within the intention of the statute; but here the words are particular, and cannot, I think, be extended by construction.

Order of sessions confirmed. (a)

(a) *Best J.* was absent in the Bail Court.

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DEYBEL's Case.

Monday,
February 5th.

THE prisoner, an impressed seaman, was brought up by virtue of a writ of habeas corpus, directed to the Admiral of the fleet at *Chatham*. The return to the writ stated, that, on the 28th *November*, 1820, a certain foreign smuggling vessel, called the *George*, of *Flushing*, on board of which were divers, to wit, six subjects of his majesty, being mariners, was found and discovered by the commander and crew of his majesty's revenue cruiser, called *The Griper*, to have been and to be within eight leagues of that part of the coast of *Great Britain* called *Suffolk*, that is to say, within eight leagues of *Orfordness*, in the county of *Suffolk*, having then and there on board thereof divers large quantities of foreign spirits, tea, and tobacco; that is to say, 1736 gallons of foreign geneva, and 346 gallons, the said geneva and brandy being in 595 casks of less size than 60 gallons each, to wit, four gallons each (the said foreign spirits not being for the use of the seamen belonging to the said vessel, not exceeding two gallons for each seaman), 700lbs. weight of tea, and 2039lbs. weight of tobacco, the said tobacco being in 35 casks and 25 packets, each containing less than 450lbs. weight, to wit, 34lbs. weight each, not being for the use of the seamen, and the tea and tobacco not having been shipped duly for exportation, as merchandise on board the said vessel, from some port in *Ireland*. The return further stated, that the vessel was liable to forfeiture, and was seized, and that the prisoner, *Jacobus Deybel*, being a subject of his majesty,

and

The Court will not take judicial notice of the local situation and distances of the different places in the counties of *England* from each other; and therefore, where a return to an habeas corpus stated that the prisoner was found on board a vessel, discovered within eight leagues of that part of the coast of *G. B.* called *Suffolk*, to wit, within eight leagues of *O.*, in that county, it was held not to be averred with sufficient certainty, that the vessel was not within four leagues of the coast of *G. B.*, between the *North Foreland* in *Kent*, and *Beachy-head* in *Sussex*.

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and a mariner and seafaring man, was found on board the said vessel so being liable to forfeiture, and seized, and was, by virtue of the statute in that case made and provided, liable to be stopped, arrested, and detained, for the cause aforesaid, and being so liable, was arrested. It then stated, that being so arrested, &c., and liable, &c., and being fit and able to serve in his majesty's naval service, he was afterwards, to wit, on, &c., carried before *A. B.* and *C. D.*, two of his majesty's justices of the peace, &c., residing at the port of *Harwich*, into which port of *Harwich* the vessel was then and there taken and carried, and upon due proof, as by the statutes in that case made and provided is required, was committed, to answer such information as might be preferred, and being so committed, was impressed, and was for that cause detained.

Larres Serjt. objected to this return; first, that it did not appear, with sufficient distinctness, that the ship on board of which the prisoner was found, was, at the time, within the limits specified in the 59 G. 3. c. 121. s. 1. That act provides, that if any foreign smuggling vessel or boat, in which there shall be one or more subjects of his majesty, whether mariners or persons pretending to be passengers, shall be found or discovered to have been within four leagues of that part of the coast of *Great Britain* which is between the *North Foreland*, on the coast of *Kent*, and *Beachy-Head*, on the coast of *Sussex*, or within eight leagues of any other part of the coast of *Great Britain* or *Ireland*, having on board any foreign brandy, &c., such vessel shall be forfeited; and every such subject of his majesty, who shall be found on board such vessel, shall be liable to all the pains and penalties, &c.

&c. in like manner as persons being subjects of his majesty, found on board vessels liable to forfeiture, belonging wholly or in part to his majesty's subjects, are by the previous laws liable. Now it is not stated that the vessel was found within four leagues of the coast between the *North Foreland* and *Beachy-Head*, and, for any thing that appears here, she might have been within eight leagues of that part of the coast; all that is stated is, that she was within eight leagues of that part of the coast of *Great Britain* called *Suffolk*, to wit, within eight leagues of *Orfordness*, in the county of *Suffolk*. It is not clear, that there may not be a part of the coast called *Suffolk*, between the *North Foreland* and *Beachy-Head*. And although it is subsequently averred, that it was within eight leagues of *Orfordness*, in the county of *Suffolk*, still the Court, although they will take judicial cognizance of the different counties of the kingdom, cannot carry that so far as to take judicial cognizance of all the different parts of those counties, and their local situation. Non constat but that *Orfordness* may be some isolated part of the county of *Suffolk*, situated between the limits in question. He was then proceeding to take some other objections to the return, but the Court called upon the other side.

Jervis in support of the return, contended, that as the Court would take judicial notice of the different counties of *England*, of which *Suffolk* was one, and that as this return stated that the vessel was found within eight leagues of that part of the coast of *Great Britain* called *Suffolk*, which is, by the next averment, stated to be within eight leagues of a place in that county, the return was quite sufficient.

1821.

DEYSEL'S
Case.

BAYLEY J. It is quite true, that this Court will take judicial notice of the general division of the kingdom into counties, because they are continually in the habit of directing their process to the sheriffs of those counties, and because they are mentioned in a great variety of acts of parliament. But still, I think, that the present return is insufficient. In these cases, the greatest certainty is requisite; for the Court must see, distinctly, that the party who is brought up is justly deprived of his liberty. Now the act of parliament says, that a party may be properly detained in custody, if he is found on board a vessel within four leagues of the coast between the *North Foreland* and *Beachy-Head*, or within eight leagues of any other part of the coast. This return does not follow the words of the act of parliament, but states, that the vessel was discovered, not within eight leagues of the coast of the county of *Suffolk*, but within eight leagues of a place in a part of the coast called *Suffolk*. Now I cannot say, judicially, that there is no place on the coast between the *North Foreland* and *Beachy-Head*, which is called *Suffolk*, and therefore, if it had stopped there, it seems to me, that this return would have been insufficient. But it is said, that there is an additional averment, stating, that the vessel was discovered within eight leagues of *Orfordness*, in the county of *Suffolk*. I have before said, that this Court will take judicial notice of the general divisions of counties, but that cannot be extended to the particular parts of counties and their local situation. We know very well, that there are many parts of counties separated from the general body of the county. There is a part of the county of *Durham* which is situated to the north of *Northumberland*, and so the parish of *Creyke*, belonging

longing to the same county, is surrounded by the North Riding of *Yorkshire*; and there are many other parts of other counties similarly situated. The Court, therefore, cannot judicially know, whether *Orfordness*, which is averred to be part of the county of *Suffolk*, may not be an isolated part of it, situated on the coast between the *North Foreland* and *Beachy-Head*; and if so, there is nothing on this return to shew, that the vessel was discovered within the limits mentioned in the act of parliament. The proper course would have been, to have stated, negatively, that the vessel was found within eight leagues of a part of the coast of *Great Britain*, not between the *North Foreland* and *Beachy-Head*, to wit, within eight leagues of *Orfordness*, in the county of *Suffolk*. The present return, however, is insufficient, and the prisoner must be discharged.

1821.

 DEYREL'S
Case.

HOLROYD J. I am of the same opinion. The present objection will be valid, unless the Court are bound by law to take judicial notice, not only of every county, but of the local situation of every place in any county; and I think that they are not bound so to do. I agree that this allegation, taken altogether, must be taken as a positive allegation, that the vessel was found within eight leagues of a part of the county of *Suffolk*. For, though part of this allegation is under a videlicet, it is, nevertheless, sufficiently certain. But assuming that to be so, still the Court cannot take judicial notice of the local situation of *Orfordness*. The parish of *Swallowfield*, which is only six miles distance from *Reading*, in the county of *Berks*, is in the county of *Wilts*; and if in the case of a robbery committed there, it became necessary that the fact, as to its local situation, should appear,

1821.

DRYANL'S
Case.

it would be necessary to prove that fact upon the trial. So here it was necessary to have stated, that *Orfordness* was not between the *North Foreland* and *Beachy-Head*; and this not having been done, I think that this return is insufficient.

BEST J. It ought to be quite clear, in a case like the present, that a party detaining a prisoner, has authority by law so to do. It ought, therefore, to appear, on the face of the return, that the case is brought accurately within the provisions of the act of parliament; now that has not been done here. We ought, it is true, to take judicial notice of the counties of *England*, and of those which are maritime counties, as being noticed in a variety of acts of parliament. But we cannot do this, with respect either to the local situation of the different places in each county, nor of the distances of one county from another. It seems to me, therefore, that we cannot take notice, judicially, either that *Orfordness* may not be an isolated part of the county of *Suffolk*, or even if it be part of the body of that county, that it is not within eight leagues of *Beachy-Head*. I think, therefore, that the objection ought to prevail.

The prisoner was discharged. (a)

(a) *Abbott C. J.* had left the Court.

1821.

DOWSON *against* LEVI.Monday,
February 5th.

READER had obtained a rule to shew cause why the plea of bankruptcy, pleaded puis darrein continuance, should not be set aside, and the defendant restrained to the plea of the general issue, and pay the costs of the application. It appeared from the affidavits, that in consequence of bail not having been put in and perfected in due time, an assignment of the bail bond had been taken, and an action brought upon it. In consequence, an application, in the usual terms, had been made to the Court to stay the proceedings in such action: the Court ordered the bail bond to stand as a security, a trial having been lost. The defendant afterwards pleaded the general issue, and subsequently put in a plea of bankruptcy, puis darrein continuance.

The proceedings in an action on the bail bond having been stayed, the defendant pleaded to the original action the general issue, and subsequently a plea of bankruptcy, puis darrein continuance. There being no affidavit that the application to stay the proceedings was made on the part of the bail, the Court now set aside the latter plea, and restrained the defendant to his plea of general issue, on the ground that when the proceedings were stayed in the action on the bail bond, it was intended that the defendant should only question the validity of the original debt.

Milner shewed cause, and contended that the Court could not interfere, it being a matter of right on the part of the defendant to put in the present plea; and he cited *Paris v. Salkeld*. (a) As to the former application to the Court, that may have been at the instance of the bail, who must, by the rule of Court, have sworn that it was made without collusion with the principal. It ought not, therefore, to bind the principal.

Reader and *Marriott*, *contra*, were stopped by the Court.

(a) 2 *Wil.* 137.

1821.

 Dowson
 against
 Levl.

BAYLEY J. When the proceedings were stayed upon the bail bond, it is clear that the only question which the Court intended to permit the parties to try was whether the debt existed; for otherwise they would not have interfered so as to relieve the bail. After this application to the favour of the Court, the principal, by this plea, evades altogether the question as to the validity of the debt, and obtains relief by a collateral circumstance which has occurred subsequently. It is said that he may have been no party to the former application. If there had been an affidavit to that effect, I should have thought that we were not at liberty to take the plea off the file; but, in that case, we should have relieved the plaintiff by rescinding our former order for staying the proceedings upon the bail bond. As, however, there is no such affidavit, the rule must be absolute.

Rule absolute.

 Monday,
 February 5th.
ANDREWS *against* PALMER.

Where a case was referred by order of nisi prius, and after the reference, but before the making of the award, the plaintiff became bankrupt: Held, that this was no revocation of the submission, and that the arbitrator having awarded a verdict for the defendant had done right.

THIS case, which was an action of assumpsit, was referred by order of nisi prius in *December*, 1812; and after the reference, but before the making of the award, the plaintiff became bankrupt. In *January*, 1813, the arbitrator made his award, and thereby ordered the verdict to be entered for the defendant; two days after which a commission of bankruptcy issued against the defendant, who was thereupon adjudged and declared a bankrupt, and all his estate and effects were duly assigned under and by virtue of such commission. No further

further proceedings were had till last *Michaelmas* term, when the defendant taxed his costs and signed judgment, and took out execution for the amount,

1821.

Answers
against
PALMER.

Bayly now moved for a rule to shew cause why the judgment and subsequent proceedings should not be set aside, contending that the assignment under the commission having, by virtue of the statutes of bankrupt, divested out of the bankrupt all his estate and interest in the subject matter of the reference from the time of his bankruptcy, and deprived him of all controul over any part of his property, the bankruptcy must, under these circumstances, have operated as a countermand of the submission. He cited *Com. Dig.*, tit. *Arbitrament*, D. 5., where it is laid down, that if there be a submission by a feme sole, who marries before an award made, it will be a revocation; so, if the woman and *B.* submit on one part, and the woman marries, it will be a revocation as to *B.*; and 1 *Rol.* 331. l. 45. *Jon.* 388. are cited. (a) This is a stronger case than that of a feme sole marrying after the submission, for she divests herself of the controul over her property by her own act; but here, the proceedings under the statutes of bankrupt are in invitum. In *Tidd's Practice*, 879., 6th edition, there is a case cited from 1 *Crompt.* 270., where the Court refused to grant an attachment for non-payment of money due on an award, because the defendant was a bankrupt and unable to pay it; and supposing the subject matter of the reference to have been the delivery of a horse, or the assignment of a term, the bankruptcy, vesting the property in his assignees, would render it impossible for him to have done either the one or the other.

(a) See *Charnley v. Winstanley and Wife*, 5 *East*, 266.

1821.

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ANDREWS
against
PALMER.

Per Curiam. The bankruptcy did not operate as a revocation of the submission. It would not have put an end to the suit which the bankrupt had instituted, nor can it, therefore, put an end to the arbitration founded upon that suit; and if he has commenced an action without having any cause for it, the bankruptcy neither does nor ought to protect him against the consequences of it. Here the arbitrator was of that opinion, and his judgment is right. In the case of the feme sole, her marriage is a revocation; for it is in law a civil death of all her rights: but bankruptcy does not produce that effect.

Rule refused.

Monday,
February 5th.

HOLT *against* BRIEN.

Where a husband, not separated from his wife, makes an allowance to her for the supply of herself and family with necessaries during his temporary absence, and a tradesman, with notice of this, supplies her with goods, the husband is not liable for the debt.

ASSUMPSIT for goods sold and delivered. Plea, general issue. At the trial at the last Spring assizes for the county of *Devon*, before *Wood B.*, it appeared, by the plaintiff's case, that the defendant was a surgeon on board one of his majesty's ships of war, and that his wife and four children lived at *Plymouth*, whilst he was absent at sea; that during that time, the plaintiff, who was a butcher, supplied the wife with meat, to the amount of 15*l.* and upwards. It also appeared, that after the defendant returned, he promised to pay the bill, provided he was not arrested. For the defendant, it appeared that he had been arrested by the plaintiff, and that before these goods were supplied the plaintiff had been distinctly informed that he was not to trust the defendant's wife again, and that if he did, the defendant

fendant would not pay the bill; he was also informed, that the defendant allowed his wife an annual income of 100*l.*; that the plaintiff himself had said, that when the wife applied to him, she induced him to trust her, by promising to pay him out of her quarterly allowance. It appeared, also, in evidence, that this allowance had been punctually paid. The learned Judge told the jury, that as there was no proof of any separation between the defendant and his wife, nor any separate maintenance settled upon her by deed, the defendant must be considered as liable for all debts contracted by his wife for the necessary support of herself and children; and he left it to the jury to say, first, whether the goods in question were necessary, and, secondly, whether by the subsequent promise the defendant had not adopted the debt. Under this direction, the jury found a verdict for the plaintiff. A rule nisi for a new trial, on the ground of a misdirection on the part of the learned Judge, having been obtained in last *Easter* term,

1821.

HOLT
against
BRIER.

Pell Serjt. and *Adam* shewed cause, and contended, that the learned Judge's direction was correct. A husband cannot, by law, leave his wife in a situation so as to be deprived of the necessaries of life; and although, in this case he made her an allowance, yet it might be reasonably left to the jury to consider whether such allowance was sufficient for the support of the wife and four children. But, at all events, in this case there is a subsequent promise to pay the bill; and although the party chooses to annex a condition to it, which was not complied with, yet, inasmuch as he had no right to annex

1821,

Holt
against
Barn,

annex such a condition, the noncompliance with it is immaterial.

Casberd, contra, was stopped by the Court.

BAYLEY J. It appears to me, that this case has not been properly left to the jury, and that there ought to be a new trial. If a husband makes no allowance to his wife, he gives to her a general credit, and she may contract debts, for the necessary supply of herself and family, for which he will, ultimately, be liable; but that proceeds on the ground that, in such a case, she is to be considered as his agent in contracting the debts. But if he supplies her with a sufficient allowance for the purpose of paying for these necessary supplies, and the tradesman with whom she deals has notice of it, and afterwards trusts her, he does so at his own peril, and will only be entitled to recover by proving that, in fact, the allowance was not regularly supplied. In this case, however, the learned Judge told the jury that, in his opinion, the husband was liable, because there was no separation between him and his wife, nor any separate maintenance secured to her by deed. But I think that, in so stating it, he did not lay down the law correctly to the jury. Then, as to the subsequent promise, if the husband was not originally liable, but was contracting an obligation *de novo* with the creditor, the latter must take it on the terms on which it is offered to him. Here it was a conditional promise, that he would pay if he was not arrested, and I think that the creditor cannot reject this condition; for the promise, in this case, did, as it seems to me, create a new obligation.

gation. I think, therefore, that there ought to be a new trial.

1821.

HOL
ROYD
J. vs.
BANK.

HOLROYD J. I am of the same opinion. If a husband supplies his wife with money sufficient for the purchase of necessaries, he is not liable for any debt contracted by her for necessaries to a party who has notice of the allowance. Here the plaintiff had express notice of that fact, and trusted the wife on her own promise, to pay out of her quarterly allowance; and although that was not binding, in point of law, upon her, still it shews, that the credit was given expressly to the wife, in which case the husband is not liable, according to the authority of *Bentley v. Griffin* (a), and *Metcalf v. Shaw*. (b) As to the second point, if a fresh demand is created by a promise which is conditional, the condition must, of course, be complied with. I am, therefore, of opinion, the verdict in this case was wrong.

BEST J. The acknowledgment, in this case, was left to the jury, as an unconditional acknowledgment by the defendant; but I think the learned Judge should not have left it to the jury at all; for as the condition had not been complied with, the promise was altogether at an end. Upon the other point, I also entirely agree with the rest of the Court. The ground upon which a husband is liable for debts contracted by his wife is because she is supposed, in contracting them, to act as his servant or agent. But here the allowance made to her, the notice of it given to the plaintiff, and his conduct thereupon, clearly shew, that, as to him, her agency, in this respect, was countermanded. I am,

(a) 5 Taunt. 356.

(b) 5 Campb. 22.

therefore,

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HOLT
against
BRIEN.

therefore, of opinion, that the rule for a new trial ought to be absolute.

Rule absolute. (a)

(a) *Abbott C. J.* had left the Court.

Tuesday,
February 6th.

JELLIS, Assignee of ROUTLIDGE, a Bankrupt,
against MOUNTFORD.

A creditor of an insolvent trader may, after the debtor's discharge under the 53 G. 3. c. 102., take out a commission of bankruptcy against him; and his debt, although included in the insolvent schedule, will be a sufficient petitioning creditor's debt at law to support the commission.

ASSUMPSIT for money had and received to the use of *James Routledge*, before he became bankrupt; there was also a count for money had and received to the use of the plaintiff as assignee of *Routledge*. Plea, general issue. The cause was tried before *Abbott C. J.* at the sittings after *Trinity* term, 1818. The jury found a verdict for the plaintiff, damages 121*l.* 3*s.* 5*d.* subject to the opinion of this Court on the following case:

In *September*, 1813, *James Routledge*, being a trader within the bankrupt laws, committed an act of bankruptcy. The defendant, on the 2d *November* in the same year, knowing that *Routledge* was insolvent and was then keeping out of the way of his creditors, issued a fieri facias against his effects, under which they were sold, and the proceeds of them, to the amount of 121*l.* 3*s.* 5*d.*, paid over to the defendant in the course of that month. He, however, upon some of the other creditors threatening to make *Routledge* a bankrupt, agreed to bring that money into the general fund for the benefit of the creditors, and to take a deed of assignment of all his estate and effects, which, accordingly, on the 15th *July*, 1814, was prepared and executed by

Rout-

Routledge to the defendant and one *Frederick Nicholson* in trust for themselves and such other creditors as should, within two calendar months, come in and execute the same. This deed was executed by the defendant and some of the other creditors, but not by the plaintiff, and no evidence was given upon the trial to shew that the plaintiff ever had notice of the assignment till after the expiration of the two months. On the 11th *June*, 1815, *Routledge*, having been arrested by one *Chambers*, a creditor, went to prison for want of bail, and after having remained there above three months, petitioned the court for the relief of insolvent debtors to be discharged. He was, accordingly, on the 19th *January*, 1816, discharged out of custody by the authority of that court, according to the provisions of 53 G. 3. c. 102. and the 54 G. 3. c. 23. On that occasion he entered into the recognizance required by the 14th section of the latter act. In his petition he stated that he had no property except certain debts and effects made over by him (subsequently to the levy of 2d *November*, 1814, but prior to his imprisonment) to the trustees named in the said deed of assignment, for the benefit of his creditors; no mention, however, of the said levy or of the money arising therefrom, was made in the petition, or schedule, or in the assignment executed by him upon his discharge from custody under the insolvent acts. The schedule annexed to *Routledge's* petition set forth the debts, both of the plaintiff and the defendant, and they both had due notice of the application made for his discharge, but neither of them, in anywise, interfered in it. Shortly after his discharge under the insolvent acts, the plaintiff, by his attorney, applied, without success, to the defendant and to the defendant's attorney

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against
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 against
 Mountroad.

attorney (then holding the deed of assignment) for permission to sign the same. In *July*, 1816, a commission of bankrupt issued against *Routledge* on the petition of the plaintiff, upon the debt specified to be due to him in the schedule of *Routledge's* petition, and the plaintiff was appointed assignee under that commission. This action was brought to recover the proceeds of the sale under the execution of the 2d *November*, 1818.

West, for the plaintiff. The only question in this case is, whether there was a good petitioning creditor's debt to support the present commission; and this will depend on the circumstance, whether the debt of the plaintiff was discharged by the proceedings under the insolvent debtor's act. But the discharge spoken of throughout that act is only a discharge of the insolvent from custody, but not a discharge of him from the debts. By the first section of 53 G. 3. c. 102., the prisoner is to pray to be discharged out of custody, and to have future liberty of his person; and by section 10. he is to be discharged from custody, and judgment is to be entered up against him, which, by order of the Court, may be executed against his future effects, &c. By section 29., if again arrested, he is to be discharged by a Judge, on entering a common appearance. These different provisions all shew that the only thing intended by the 53 G. 3. c. 102. was to discharge the person of the insolvent, but not to extinguish the debt of the creditor. It is true, that by the 32d section a general plea is given by the insolvent against any action brought for any debt included in his schedule, and from which he has been discharged; but this section does not extinguish the debt itself. All that is done by it is to change

change

change the nature of the remedy from an action for the debt to a proceeding under the judgment entered up in the insolvent court. The words of the insolvent act are very different from those of 5 G. 2. c. 30. s. 7. By that act it is provided, that "every such bankrupt shall be discharged from all debts due or owing at the time he did become bankrupt;" but the 53 G. 3. c. 102. contains no such provision. It, indeed, takes away the remedy by action, but leaves the debt not extinguished. Besides, in this case the objection is taken, not by the bankrupt, but by a third person, who is seeking to overturn this commission: he cannot take advantage of such an objection. If the insolvent does not plead his discharge, he will be liable for the debt; and non constat that he will plead it. In *Quantock v. England* (a) it was held that a third person could not object that the petitioning creditor's debt had been barred by the statutes of limitations; and Lord Mansfield there said that the statute of limitations did not destroy the debt, but only took away the remedy; and that, for that reason, although the bankrupt might take the objection, no other person could do so. And in *Bickerdite v. Bollman* (b), the same principle was recognised. If any inconvenience be felt by the bankrupt, he may apply to the Lord Chancellor to supersede the commission. This, therefore, is a good petitioning creditor's debt, as against the defendant in the present action.

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against
MOUNTREY.

Lawes Serjt., contra. In order to constitute a good petitioning creditor's debt it must be a legal debt, and one which the creditor has the power to enforce by a legal remedy. This case must, therefore, be tried by

(a) 5 Burr. 2628.

(b) 1 T.R. 405.

that

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against
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that test. Then, is this debt of that description? By the insolvent act, all the property of the prisoner is first vested in the provisional assignee till another assignee is chosen: after that has taken place, the assignee appointed by the creditors takes it for the purpose of general distribution. The insolvent, then, after being discharged out of custody, pursuant to 54 G. 3. c. 23. s. 14., enters into a recognizance to the king for the full amount of the debts included in his schedule, which recognizance is to be put in force, if necessary, against his future effects. Upon this recognizance alone can the creditors, who are named in the schedule, afterwards proceed; for if any of them choose to bring an action, or arrest the insolvent, he may, by the 29th section, be discharged with costs, on entering a common appearance; and, by the 32d section, he may then plead his discharge in bar of the debt. Here, the petitioning creditor's debt is named in the insolvent's schedule, and he was discharged generally. There is, therefore, no legal mode of enforcing payment of this debt. If so, then according to the principle laid down as the criterion, this cannot be a good petitioning creditor's debt. That this is the true principle appears from the judgment of Lord Eldon, in *Ex parte Dewdney* (a); where he says, "A commission of bankruptcy is nothing more than a substitution of the authority of the Lord Chancellor, enabling him to work out the payment of those creditors, who could, by legal action or equitable suit, have compelled payment." Here the petitioning creditor could not have compelled payment; and Lord Eldon afterwards adds, "The Lord Chancellor, in the distri-

(a) 15 Ves. jun. 498.

bution,

bution, is to govern himself, as to legal debts, by the rules of law, and as to equitable debts, by the rules of equity, regarding the claim of each creditor as a suit depending. That is the general principle; and I see no reason for holding that it is not competent to the bankrupt to take this objection, and if he waives it, to creditors." This seems to decide the present case; and *Horsley's case*, *Moseley* 37., cited in *Quantock v. England*, is exactly in point. And though Lord Mansfield doubted its authority, the subsequent judgment of Lord Eldon accords with that case. *Cohen v. Cunningham* (a) is an authority to shew, that a judgment creditor, who has taken his debtor in execution, cannot afterwards sue out a commission of bankrupt upon the same debt. If the regulations of the insolvent act and the bankrupt law are inconsistent, then, as both cannot operate, that which has the priority must prevail. Unless that be so, the greatest inconvenience will follow. After the insolvent's assignee has received from the debtors, and paid to the creditors, a commission of bankruptcy may issue, founded on the three months' lying in prison; and then all the debtors may be compelled to pay their debts over again, and the assignee will be compellable to refund the monies paid by him to the creditors. Under such circumstances, no one could be safe. And the case of the insolvent would also be hard; for, by the recognizance, his future effects are liable; and yet the commission would sweep away all his subsequently acquired effects. These inconveniences shew that the Court ought not to adopt such a conclusion as the plaintiff contends for on the present occasion.

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 against
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West, in reply, was stopped by the Court.

(a) 3 T. R. 125.

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against
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ABBOTT C. J. It appears to me, that the single question in the case is this, — was the bankrupt, at the time when the commission issued, indebted to the petitioning creditor? Unquestionably that debt, at one period, did exist; and the only point to be considered is, whether by the operation of the insolvent debtors' act, it was subsequently extinguished. For if it was so extinguished, the commission cannot be supported; but if not, it still remains a debt; and we, sitting in a court of law, must pronounce the commission founded upon it to be valid. In the course of the argument many inconveniences have been pointed out to us, with which the issuing of a commission of bankrupt, in a case like the present, might be attended; but we ought not to forget that, in all cases, it is in the power of the Lord Chancellor, by superseding the commission, to remedy those inconveniences. And, on the other hand, it may be observed, that there are also many cases where, notwithstanding a party's discharge under the insolvent debtors' act, it may be of the utmost importance, for the benefit of his creditors, that a commission of bankrupt should issue; for the assignee under it has a much more extensive power of recovering the effects of the bankrupt than is given by the insolvent debtors' act. All these respective inconveniences and advantages may be presented to the consideration of the Lord Chancellor; but we, in a court of law, have only the power to determine whether the petitioning creditor's debt be sufficient, and not to enter into the question, whether a commission ought or ought not to issue. The proper course for us to pursue is, therefore, to enquire only, whether the insolvent debtors' act contains any provision which extinguishes the debt. Now, if the legislature had intended to extinguish it, one word would

would have been sufficient; but no such word is found in the act of parliament. On the contrary, for all purposes of obtaining relief and ultimate payment, in common with the rest of the creditors, the debt is still recognized as in existence. I am, therefore, of opinion that the debt was not extinguished, and that it was one upon which a commission of bankrupt might properly be founded.

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against
MOUNTFORD.

BAYLEY J. I am of the same opinion. It seems to me, that the petitioning creditor's debt was not so far discharged, by the operation of the insolvent debtors act, as to deprive him of the right of suing out a commission founded upon it. At the time when the debtor applied for his discharge under the act, it is clear that the Plaintiff was at liberty to sue out a commission. The debtor was afterwards discharged, and, in his schedule, this debt of the petitioning creditor was inserted; and therefore the debtor would have the benefit given, to which he was entitled under the insolvent act. Now the effect of that act is no more than this, viz. preventing the person discharged from being afterwards kept in custody, for any debt included in his schedule. If, therefore, he be arrested, he may, by s. 29, be discharged, and the creditor compelled to pay costs. And again, by s. 32, the creditor is deprived of any remedy for his debt by action. The act, however, is altogether silent as to any other remedy, and does not prohibit the suing forth of any commission of bankrupt. It is to be recollected, that an insolvent debtor applies to the Court for specific relief. The consequence of his having previously committed an act of bankruptcy, may, it is true, render ineffectual all that has been done subsequent to his discharge. But we must recollect, that at all events, it is quite clear, that the discharge has no operation as

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against creditors not named in the schedule. Any of those creditors, therefore, might lawfully sue out a commission; and then the same effect would take place, and all the property of the insolvent would vest in the assignees appointed under that commission. Now, to prevent this inconvenience, which would be still greater than those suggested, it seems to me that the creditors named in the schedule ought to have the power of suing out a commission; for they cannot be sure that the creditors not named may not afterwards make their whole proceedings void. Besides, as my Lord Chief Justice has already pointed out, their remedy under the bankrupt laws is much more extensive than under the insolvent act. The circumstances of this case demonstrate it; for this defence is set up by a person upon whom the bankrupt laws have an operation, but who cannot be reached by the provisions of the insolvent act. Here, the payment of the money to the defendant was void under the bankrupt laws; and the petitioning creditor finding that he cannot set it aside under the insolvent act, has obtained a commission, and is seeking to distribute the proceeds amongst all the creditors of the bankrupt. I am, therefore, of opinion that the petitioning creditor's debt still existed, and that the plaintiff is entitled to our judgment.

HOLROYD J. I am of opinion, that this was still a subsisting debt at the time when the commission issued, and that it constituted a good petitioning creditor's debt. By the 10th section of the 53 G. 3. c. 102. on the discharge of the debtor from custody, a judgment is to be entered up against him for the amount of the debts in his schedule, which, however, is not to be executed, except by order of the insolvent court.

Then

Then come the 29th and 32d sections, by the former of which he is to be discharged, if arrested; and by the latter is allowed to plead his discharge by the insolvent court, in bar of any action for a debt included in his schedule. Undoubtedly that section contains the expression that he may plead it in discharge of the debt. But, taking the whole act together, I think it does not amount to an extinguishment of the debt; because the judgment spoken of in the 53 G. 3. c. 102., and the recognizance to the king substituted for that judgment by 54 G. 3. c. 23., both remain in force for the benefit of the creditors, and cannot be satisfied until the debts mentioned in the schedule are all discharged. Although, therefore, the insolvent debtors' act may be a bar to any action, yet the creditor is not thereby deprived of all legal remedy. I am, therefore, of opinion that this was still an existing debt, sufficient in a court of law to support the present commission.

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BEST J. The question here is, whether the debt was extinguished by the discharge under the insolvent act. I think it is impossible that that should be the case, when by the act it is to be kept alive for various purposes. The only object of the act was to protect the insolvent debtor, after his discharge, from being arrested again for the debt. The case of *Quantock v. England* (a) seems to me an authority in point. In *Ex parte Dewdney* (a), the objection that the debt was barred by the statute of limitations, was taken by the assignees acting for the creditors at large; but there is no case which can be cited where such an objection can be taken by a stranger, which is the case here. I think,

(a) 5 Burr. 2628.

(b) 15 Ves. 498.

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therefore, that we ought to give judgment for the plaintiff.

Judgment for the plaintiff.

Tuesday,
 February 6th.

JOURDAIN *against* WILSON.

A covenant by a lessor to supply the premises demised, (which were two houses,) with a sufficient quantity of good water, at a rate therein mentioned for each house, is a covenant that runs with the land, and for the breach of which the assignee of the lessee may maintain an action against the reversioner.

COVENANT by the assignee of the lessee against the reversioner. By the lease two messuages were demised. The breach assigned was upon the following covenant: "And the said *William Inwood*, the landlord, for himself, his executors, &c. doth covenant, promise, and agree to and with the said lessee, his executors, &c. to supply the said two messuages or tenements and premises with a sufficient quantity of good water, at the rate of three guineas per annum for each house." To this declaration there were several pleas, to some of which the plaintiff demurred; and the question argued was, whether this covenant ran with the land.

Platt was to have argued in support of the demurrer, but the Court called upon

E. Lawes, contra. This covenant does not affect the land demised, for the lessor does not covenant to lay the water on by pipes, but merely to supply the house with water, and the covenant would be satisfied by his carrying the water there in buckets. In *The Mayor of Congleton v. Pattison* (a) *Bayley J.* says, "In order to bind the assignee, the covenant must either affect the land itself during the term, such as those which regard the mode of occupation, or it must be such as *per se*, and not merely

(a) 10 *East*, 130.

from

from collateral circumstances, affects the value of the land at the end of the term ;” and he afterwards says, “ where the value of the reversion is only altered by collateral circumstances, the covenant will not bind the assignee of the land.” In *Spencer’s case* (a) it is laid down, “ If a man demises a house or land for years, with a stock or sum of money, rendering rent, and the lessee covenants for him, his executors, &c. to deliver the stock or sum of money at the end of the term, yet the assignee shall not be charged with this covenant ; for although the rent reserved was increased in respect of the stock or sum, yet the rent did not issue out of the stock or sum, but out of the land only ; and therefore, as to the stock or sum, the covenant is personal, and shall not bind the assignee.” If the water, therefore, in this case had been like the stock, a permanent and subsisting chattel, yet the covenant would not bind the assignee, because the rent does not issue out of it : and this case is still stronger ; for here there is no rent in respect of the water, but a collateral sum reserved. It is clear, therefore, that the assignee of the lessee would not be bound to pay for the water, and it is reasonable that he should not take the benefit of the covenant. He also cited *Collison v. Lettsom* (b), and *Coker v. Guy*. (c)

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 against
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ABBOTT C. J. By this lease the lessor covenants to supply the messuages and tenements demised with a sufficient quantity of good water at the rate of three guineas per annum for each house. The lease does not specifically point out the particular mode by which the water is to be supplied : whether by pipes, by collecting

(a) 5 Coke, 17.

(b) 6 Taunt. 224.

(c) 2 Bos. & Pul. 565.

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—
JOURDAIN
against
WILSON.

the water in cisterns, or by carrying it to the premises by buckets; but it is quite clear, that the covenant can not be satisfied unless a sufficient quantity of good water is brought upon the premises during the term. This is, therefore, a covenant which respects the premises demised and the manner of enjoyment, and I have no doubt, therefore, that it is a covenant which runs with the land, and that the assignee may sue the reversioner for the breach of it.

Judgment for the plaintiff.

Tuesday,
February 6th.

The Mayor, Aldermen, and Burgesses of the
Borough of READING *against* CLARKE.

Declaration in
assumpsit,
charging that
defendant was
indebted to the
plaintiff in 500
quarts of wheat
for tolls, with-
out stating any
value, is bad
upon special
demurrer.

THE declaration stated that the defendant was indebted to the plaintiffs in divers, to wit, 500 quarts of wheat, 500 quarts of barley, 500 quarts of oats, 500 quarts of tares, 500 quarts of beans, and 500 quarts of peas, &c., due and of right payable by the defendant to the plaintiffs, as and for certain tolls of wheat, barley, oats, tares, beans, and peas, before that time brought into the borough of *Reading*, by the said defendant, to be sold, and being indebted, defendant undertook, &c. To this declaration, the defendant demurred, and assigned for cause, that although it was alleged in the declaration, that the defendant was indebted to the plaintiffs in divers quarts of wheat, barley, oats, tares, beans, and peas, yet it was not stated, whether the same was of any or what value in lawful money of *Great Britain*, or that the defendant was indebted to the plaintiffs in any sum of money whatever.

Carter,

Carter, in support of the demurrer. Indebitatus assumpsit will not lie for goods and chattels, unless the value be stated. Indebitatus assumpsit will only lie where debt lies; and although in some old cases it is laid down, that debt may be maintained for goods and chattels, it must be in the detinet only, and the judgment is the same as in detinue. If this form of action can be supported, how is a defendant to pay money into court on a tender, or to avail himself of a set-off. All the precedents of declarations in debt, to recover foreign money, state the value. In *Ward v. Harris* (a) the declaration stated, that, in consideration that plaintiff had sold to the defendant a certain horse of the plaintiff, at and for a certain quantity of oil, to be delivered within a certain time, which had elapsed before the commencement of the suit; the defendant promised to deliver the said oil accordingly. Lord *Eldon*, there, was of opinion, that this declaration was bad for uncertainty, even after verdict, inasmuch as neither the value of the horse nor the oil was stated, nor any thing with respect to the quantity or quality of the oil. He says, "In the case of a sale for money, as the law implies that so much money shall be paid as the article is worth, no dispute can arise concerning the quality of what is to be received; the quality of money being always the same. I incline, therefore, to think it is necessary to express value in some manner, in such a contract as this, where something other than money is to be given for a commodity." In that case, indeed, the Court were of opinion, that the objection was cured by verdict, but it never was doubted that the objection was bad upon demurrer.

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Mayor of
READING
against
CLARKE.

(a) 2 Bos. & Pul. 265.

Bayly,

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against
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Bayly, contra. The reason for inserting the value in debt for corn or other goods, is, that in that form of action the judgment is, to recover the goods themselves, and if not, the value of them. *Paler v. Hardyman*. (a) In assumpsit, however, damages only for the breach of the contract are recoverable; the value, therefore, of the goods, which are the subject of the contract, is wholly immaterial, the whole being to be recovered in damages, and the value of the goods is frequently not the measure of the damages; when it is, it may be proved, to ascertain the amount under the averment, that plaintiff has sustained damage to such a value, at the end of the declaration. Where it is not, as upon a contract for the delivery of medicines to be used in the cure of a horse, by reason of the non-delivery of which the horse died, it would be nugatory to state the value of the goods, which would not ascertain, at all, the amount of the damage. And so it would be, upon a contract to deliver 20 quarters of wheat at a future day, without any stipulation as to value. It would be false to say, that defendant undertook to deliver wheat of such a value, when he undertook to deliver it absolutely, without any regard to value, and was bound to deliver it at the time, whatever might be its value. Neither of the cases cited on the other side is in point, neither the one nor the other having been decided upon the ground that the value was necessary. To determine, therefore, that it must be inserted, is not required by the cases, and can answer no good end whatever, all the purposes of justice being just as well answered without it.

Per Curiam. The value here, is the measure of the damages; and the constant practice, in such an action as

(a) *Yelv.* 71.

this,

this, has been, to state the value of the goods. Even in trover, and trespass for taking goods, the value is always stated. So, too, in the case of debt for foreign money or for fines. Unless, indeed, the article in respect of which the party is stated to be indebted be of some value, there is no consideration for the subsequent promise. The objection, in this case, being taken upon special demurrer, must prevail, and, consequently, there must be judgment for the defendant.

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Mayor of
READING
against
CLARKE.

Judgment for Defendant.

The KING *against* The Bailiffs and Corporation
of the Borough of EYE.

Wednesday,
February 7th.

BY charter of the 9-*W.* 3. the borough of *Eye* was incorporated, under the name of the bailiffs, burgesses, and commonalty of *Eye*; it consisted of twelve capital burgesses, out of whom the bailiffs were chosen, and twenty-four common councilmen, and an indefinite number of freemen. The charter did not point out who were entitled to be admitted freemen, but in the 8th *Eliz.* the corporation made a bye law, that as often as any vacancy should happen by death or otherwise in the number of the twelve capital burgesses, the remainder should elect others out of the common council of twenty-four to fill such vacancies; and that upon the happening of any such vacancies in the number of twenty-four com-

A bye law of a corporation directed that upon the happening of any vacancy in the number of 24 common council, such vacancies should be filled by the freemen inhabiting the town; and that a court should be holden once every year, at which it should be lawful for the bailiffs to admit to the freedom of the town such persons as had been resident therein for one whole year:

Held, that this bye law did not give to every person who had been so resident for that period, an absolute right to be admitted to the freedom of the borough; and the Court refused a mandamus to the bailiffs to admit such a person.

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against
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Eye.

mon councilmen, such vacancies were to be filled by freemen inhabiting the town, and who had been resident and dwelling therein for the space of one year at least, to be elected by a majority of the twenty-four; and that once in every quarter of a year, the bailiffs should hold a great court, and that at every such court it should be lawful for the bailiffs to admit to the freedom of the town such persons as should be suitors for the same, and withal should be thought honest and well-disposed men, and being such as had been resident and dwelling within the town of *Eye* by the space of one whole year at the least. The affidavit then stated that *George Twitchett* had been resident and dwelling for the space of one whole year on the 27th *October* last, when one of the great courts was held by the bailiffs of the town, and that he had attended, requested and demanded of the bailiffs to be admitted to his freedom.

Cooper now moved for a mandamus to the defendants to compel them to admit *George Twitchett* to his freedom; and he contended that the bye law was imperative upon them to admit any person qualified as therein mentioned to the freedom of the borough.

ABBOTT C. J. I am perfectly satisfied, that this bye law does not give to any person resident during the time therein mentioned an absolute right to be admitted to its freedom. The words are, "that it shall be lawful for the bailiffs, &c. to admit." Those words clearly give to the bailiffs a discretionary power to admit the persons who have the qualifications therein mentioned, but they by no means make it imperative on them so to do. I think, therefore, that this rule should be refused.

Rule refused.

1821.

'The KING *against* FOWLER and SEXTON.*Wednesday,
February 7th.*

THIS was a writ of error, brought to reverse a judgment obtained against the defendants at the quarter sessions for the county of *Sussex*. It appeared by the record, that the defendants were indicted for stealing oats, to which indictment they pleaded not guilty, and put themselves upon the country. Upon this indictment they were found guilty. The record then stated, that because it appeared to the said justices, that, after the evidence given on the trial of the said issue had been heard, and after the said jurors had departed from the court, in order to consider of the verdict to be by them given thereon, and before the delivery of the said verdict in court, one *C. O.*, a juror, did, without the permission of the said justices, withdraw and separate himself from the rest of the jurors, and being so separated, did hold conversation with one *J. C.*, the said *J. C.* not being one of the said jurors, of and concerning the said trial, and concerning the verdict then about to be given thereon; therefore it was considered, that the verdict given in this behalf was bad and erroneous, and the same was quashed by the judgment of the said justices: and it then proceeded as follows; "therefore, let a new jury come before the justices, at the next general quarter sessions of the peace to be holden at *Chichester*, in and for the said county, to try whether the defendants, or either of them, are guilty of the premises in the indictment charged upon them or not; because, as well *W. B. L.*, who prosecutes for our lord the king, as the said defendants, have put themselves upon that jury: the same day, &c., at which last-men-

tioned

The record, in a case of felony at the quarter sessions, after stating the indictment, plea of not guilty, and verdict of guilty thereon, added, that, because it appeared to the justices, that after the jury had retired, one of them had separated from his fellows, and conversed respecting his verdict with a stranger; it was considered that the verdict was bad, and it was therefore quashed, and a venire de novo awarded to the next sessions. It then proceeded to set out the appearance of the parties at the next sessions, and the trial and conviction by the second jury; whereupon all and singular the premises being seen and considered judgment was given, &c.: Held, upon a writ of error brought, that the judgment was right.

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 The KING
 against
 FOWLER.

tioned general quarter sessions holden at *Chichester* aforesaid, on &c., before &c., justices of our lord the king, assigned to keep the peace in the said county, also to hear and determine divers felonies, &c. committed in the county aforesaid, come as well the said *W. B. L.*, who prosecutes for our lord the king, as the defendants, in their proper persons." The record then stated the conviction of the defendants by the second jury, whereupon all and singular the premises being seen and considered, judgment was given, &c. The errors assigned were, first, that the justices, at the quarter sessions held at *Chichester*, had no jurisdiction to try the offence charged in the indictment; secondly, that the justices first mentioned in the record, had no power or jurisdiction to quash the first verdict, and order a new jury to come; thirdly, that it did not appear before what justices the new jury should come, or that they were justices of the county of *Sussex*; fourthly, that the new jury were ordered to come, after the benefit of clergy was allowed; fifthly, that there was no bill of indictment preferred after the first verdict; sixthly, that there was no arraignment after the first verdict.

Norton, in support of the writ of error. The first jury having pronounced a verdict upon the issue joined, the justices had no power to order a second trial; for that would be, in effect, to grant a new trial in a criminal case, which cannot be done; and if the justices had this power in the case of a conviction, they would equally have it in the case of an acquittal. Secondly, it does not appear that the new jury were to come before justices of the county of *Sussex*. [*Bayley J.* By the venire, the second jury is to come before the justices,

tices, at the next general quarter sessions of the peace to be holden at *Chichester*, in and for the said county.] Though it is stated that the jury should come before the justices at, &c., to be holden at, &c., yet other justices than those assigned for the county of *Sussex* might be present at those sessions; and the terms of the record, in a criminal case, ought to be construed strictly. It is also stated upon the record, that the prisoners had put themselves upon the second jury. Now it does not appear that there was any arraignment before the second jury; and, if the record of the first trial is to be considered as a nullity, then the *whole* of it is to be deemed void, and a new arraignment and new plea should be taken. [*Abbott C. J.* It is expressly stated, that they had pleaded not guilty, and put themselves on the country; and having pleaded once, it was not necessary for them to plead *de novo*.] The judgment appears to be given “on all and singular” the premises; but, as one trial of the two must necessarily be irregular, the judgment pronounced upon the whole record must be erroneous, for it is impossible to distinguish on which verdict the judgment was finally pronounced.

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The King
against
FOWLER.

Per Curiam. This judgment must be affirmed. The Court is bound to pronounce what appears to them upon the whole record to be the proper judgment. Here, the first verdict was either good or bad. If it were good, then the second trial was *coram non iudice*, and may be considered as a nullity. If, on the other hand, the first verdict were bad, inasmuch as the prisoners had put themselves upon the country, the prisoners might well be tried at the next sessions, and
the

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the second trial is not to be considered in the nature of a new trial, but the first trial is to be considered a mis-trial, and therefore a nullity. In either case the judgment is right.

Judgment affirmed.

Wednesday.
February 7th.

The KING *against* The Justices of ESSEX.

By 50 G. 3.
c. 48. s. 25. it
is provided,
that any party
aggrieved by
the conviction
under that act,
who shall enter
into a recogni-
zance to appear
at the next ses-
sions, shall be
at liberty to ap-
peal to such
sessions: Held,
that this dis-
penses with the
necessity of any
notice of appeal;
and that if the
party duly enter
into the recog-
nizance, the
sessions are
bound to hear
the appeal.

JESSOPP, on a former day, had obtained a rule calling upon the defendants to shew cause why a writ of mandamus should not be directed to them, commanding them to enter continuances, and hear the appeal of *John Wright* against the conviction of a magistrate under the 50 Geo. 3. c. 48. s. 4., by which *John Wright* was convicted in a penalty for carrying more luggage tahn is allowed by the act. The said *John Wright* had, within fourteen days, entered into a recognizance, as required by the act, to prosecute his appeal against the conviction, and had given notice of appeal to the magistrate; but not to the informer. By the practice of the sessions for the county of *Essex*, eight days' notice of appeal is required to be given, in all cases, by the appellant to the respondent. It was objected at the sessions, that the practice not having been complied with in this particular, the appellant was not entitled to be heard; and the sessions allowed the objection, and dismissed the appeal. On moving for the rule nisi, the case of *Rex v. The Justices of Kent (a)* was relied on; and it was contended that the entering into the recognizance before the magistrate, dispensed with the necessity of giving notice of appeal.

(a) 5 M. & S.

Walford

Walford now shewed cause, and contended that the case of *Rex v. The Justices of Kent* could not be taken as laying down a general rule, that in all cases where an act of parliament directed a recognizance to be entered into by a party convicted, as a condition precedent to the right of appealing, the giving notice was dispensed with; but merely as proceeding upon the terms in which the practice of the sessions was described in that case, and upon the statute under which the appellant in that instance had been convicted. The act of parliament there referred to, gave the party convicted twenty-four hours to enter into a recognizance, at the end of which time it was considered to be the duty of the informer to apply for the penalty; upon which application he would, if a recognizance had been entered into, be told of that fact, and therefore any other notice was unnecessary. In the present instance, however, the party convicted had fourteen days to enter into a recognizance, and therefore the informer could not demand a warrant to enforce the penalty until the fifteenth. A recognizance might be entered into, and an appeal against the conviction be allowed in that interval, behind the back of the informer, who could not, under such circumstances, be prepared to support the conviction. If the practice of the sessions requiring notice of appeal was to be dispensed with, so might the necessity of entering the appeal; and so the informer would have no means of knowing whether it was intended to prosecute the appeal with effect or not, but must be put to watch the proceedings of the Court through the whole sessions.

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The King
against
The Justices of
Essex.

1821.

Jessopp, contra, was stopped by the Court.

**The King
against
The Justices of
Buck.**

BAYLEY J. I am of opinion that the sessions ought to have heard this appeal. Wherever the legislature has deemed a notice of appeal to be necessary, they have in express terms prescribed such notice; but here, by the 50 Geo. 3. c. 48. s. 25. it is expressly provided, "that any party aggrieved by the conviction, who shall, within fourteen days, enter into a recognizance to appear at the next sessions, shall be at liberty to appeal at the next general quarter sessions of the peace to be holden for the county." The act of parliament, therefore, does not require any notice of appeal; and inasmuch as the party convicted had entered into a recognizance to prosecute his appeal at the next sessions, the informer must have known that it was the intention of the party convicted to appeal, and any further notice was therefore unnecessary. I think, therefore, that this rule ought to be made absolute.

BEST J. concurred.

Rule absolute.

ABBOTT C. J. and HOLROYD J. had left the Court.

1821.

CAVENAGH *against* COLLETT.Friday,
February 9th.

BAYLY shewed cause against a rule obtained by *Moore* for quashing the return made by the sheriff of *Wilts* to a writ of *latitat*. The return stated, that the officer to whom the warrant was granted proceeded to an asylum for lunatics, where the defendant was, in order to arrest him, and found him insane, and in a desperate and raving state, so that he could not be taken or removed without danger to the life of the officer; and further, that he was in such a precarious state of health, that he could not be taken or removed without endangering his own life; but omitted to state that he continued so till the return of the writ, which the Court noticed on reading the return, and said that it was certainly bad on this account, for which reason the rule was made absolute. Upon this, *Bayly* suggested that the return might be amended; but that, in the mean time, a rule for an attachment might be moved for, which would be absolute in the first instance, and he should have no opportunity of shewing cause against it, which would be a case of great hardship upon the sheriff, who considered himself to have a good answer.

Where the return to a writ of *latitat* stated that the defendant was insane, and could not be removed without great danger, and continued so till the return of the writ, the Court refused an attachment against the sheriff.

The Court then said, that they would permit him to produce, on a future day, an amended return, verified by affidavit, when they would determine whether it was sufficient; and that he should be heard at the same time against the attachment, if moved for.

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—
CAVENAGH
against
COLLETT.

On this day, *Bayly* produced an amended return, stating that the defendant was, on the 13th day of *June* last, the day before the return of the writ, when the officer came to arrest him in the lunatic asylum, insane and in a desperate and raving state, so that he could not be taken or removed without danger to the life of the officer, and in so bad a state of health, that he could not be taken or removed without endangering his own life; and that he remained and continued there so insane, and in such a bad state of health, that he could not be taken or removed, without endangering his life, from thence, until the return of the writ. This was verified by the affidavit of the attending physician, who further stated that he continued so till about the end of *December*.

Moore then moved for an attachment, stating that a commission of bankrupt had been since issued against the defendant, under which he had been declared a bankrupt, and had attended the meetings of the commissioners, and answered rationally all the questions that had been proposed to him; but

The Court said, that being in possession of the facts, they should not interfere by attachment, but leave him to his remedy by action, if he thought he could make any thing of it; and they permitted the amended return to be filed.

1821.

BARBER *against* GAMSON.Friday,
February 9th.

MARRYAT, in last *Michaelmas* term, obtained a rule to shew cause why the judgment in this case should not be vacated, and the grant of an annuity, dated 25th *May*, 1819, and the deeds securing the same, delivered up to be cancelled; and why the same, together with the warrant of attorney upon which the said judgment is founded, should not be declared null and void, on several grounds. It appeared, from the affidavits, that the defendant, in *March*, 1819, was desirous of raising 2500*l.*, by way of annuity, to be charged on certain leasehold premises, which, at that time, were of about the value of 1200*l.* At the time of applying for the loan, he stated it to be his intention, to employ part of the sum advanced in building houses upon the leasehold premises, which, when completed, would make them fully worth 2500*l.*, and before the money was advanced, he offered to the attorney for the plaintiff, that, as the premises in their then state, were not a sufficient security, part of the money to be advanced should be deposited in his hands, to be called for from time to time, according as it might appear, under the certificate of the defendant's surveyor, that improvements to that amount had been made. This was assented to, and on the 25th *May*, 1819, the day on which the consideration-money was paid, the defendant, in the presence of his own attorney, deposited 700*l.* for this purpose in the hands of the plaintiff's

Where part of the consideration money for an annuity had been deposited in the hands of the grantee's attorney, till certain houses, out of which the annuity was granted, should be completed; but it appeared that the money deposited had all been paid over to the grantee, in a short time after the date of the deeds, and there was no fraud in the transaction, the Court refused to set aside the annuity, on the ground that the power given to them by the 53 G. 3. c. 141. s. 6. was discretionary, and that this was not the case of a fraudulent retainer contemplated by the act: Held, also, that in the memorial of an annuity, under 53 G. 3. c. 141., it is sufficient to state that the annuity was granted for the lives of *A. B.*, &c. (naming them), without stating their description by residence or otherwise, or adding that the annuity was granted for their joint lives or the life of the survivor, or for a term of years determinable on those lives: Held, also, that in the memorial of a warrant of attorney to confess judgment, as a collateral security for an annuity, it is not necessary to state for what penal sum it authorises a confession of judgment.

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attorney,

1821.

BARRE
against
GAMSON.

attorney, who then signed the following memorandum :
 “ Mr. *Gamson* has placed in my hands 700*l.*, which sum, or so much thereof as may be necessary, is to be applied in erecting and finishing in a workmanlike manner, 18 messuages upon ground at *Queen's Head Walk, Hoxton*, (which with other premises were assigned as a security for an annuity of 250*l.*) to be drawn from time to time, as wanted, under the order of Mr. G.'s surveyor, and the balance, if any, to be returned to Mr. G.”
 The whole of the money was accordingly advanced to defendant from time to time, with the exception of one sum, which was due from the defendant to the plaintiff's attorney for the expenses of the deed. The last of these payments was made on the 2d *August*, 1819. It was sworn, by the plaintiff's attorney, that the 700*l.* had been placed in a drawer in his office, and that neither directly nor indirectly had any profit arisen therefrom, either to himself or the plaintiff. The objections to the annuity were, first, that this sum of 700*l.* had been retained contrary to the provisions of 53 G. 3. c. 141. s. 6.; secondly, that the memorial stated, that the annuity was granted for the lives of four persons named, whereas the deed stated it to be for 99 years, determinable on lives; thirdly, that the descriptions of the cestui que vies were not stated, nor whether the annuity was for their joint lives, or that of the survivor; and lastly, that the memorial did not mention for what penal sum the warrant of attorney authorised a confession of judgment.

Scarlett, Tindal, and *E. Alderson* shewed cause, and were desired by the Court to confine themselves to the first objection. This was not a retainer within the act, for the true construction of the statute is confined

finéd to cases where fraud has existed. The word "practices," found in the section, shews this; and the pretences which are named, are all those which are of a fraudulent nature, and where the money retained is never ultimately paid to the grantor of the annuity. This is only a temporary retainer, and all fraud is negatived by the affidavits. Nor is it a retainer for the plaintiff's advantage; for it only increased the value of the security, which, correctly speaking, is only an advantage to the defendant. And they cited *Ex parte Mackenzie* (a) and *Coare v. Giblett* (b), on this part of the case. Besides, at all events, it is not imperative on the Court to set aside the deeds, but they have a discretion on the subject; *Cook v. Power* (c). And in *Berry v. Bentley* (d), *Poole v. Cabanes* (e), and *Drake v. Rogers* (f), the Court there exercised a discretion, by only setting aside the annuity upon certain terms. Here, the whole transaction being fair, and the Court having a discretion on the subject, the rule ought to be discharged.

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Marryat, Denman, and Marriott, contra. This is an attempt to evade the provisions of a most salutary act of parliament, made for the protection of needy persons, who, otherwise, may be, from necessity, compelled to accede to any terms, however unreasonable. It enacts, that if the consideration-money, or any part of it, be retained, on pretence of answering the future payments of the annuity, or on any other pretence,

(a) 4 Taunt. 323.

(b) 4 East, 85.

(c) 1 Taunt. 372.

(d) 6 T. R. 690.

(e) 8 T. R. 528.

(f) 2 Brod. & Bing. 19.

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that it shall be lawful for the Court to order the deeds to be delivered up to be cancelled, &c. Now the words are very general, and include the present case. If this be not a retainer within the statute, because a part only has been for a time retained, then it would not be within it, if all the consideration-money were kept, and for any longer period. There is no difference, in principle, between the two cases suggested. Here, too, it is retained in consequence of a previous agreement; and it is for the benefit of the grantee, whose security is increased in value, and to the detriment of the grantor, who loses the intermediate advantage to be derived from the use of the money. The first objection, therefore, is clearly within the statute. As to the second, the memorial ought to have stated, according to the fact, that the annuity was for a term of years, determinable on lives; for, otherwise, it gives incorrect information to the grantor, for whose protection it is required. And a similar observation applies to the third objection. The last objection is founded on the schedule of the memorial given by the act; for there it is stated, in the column headed "Nature of Instrument," "Indentures of lease and release. Bond, in penalty of 1200*l*. Warrant of attorney, to confess judgment on same bond." So that there, by reference to the bond, it is easy to ascertain the penal sum for which judgment is to be confessed. But here there was no bond; and, therefore, the warrant of attorney standing alone, the sum for which it authorised a confession of judgment ought to have been added.

BAYLEY J. I am of opinion that in this case the rule ought to be discharged. As to the objection which
has

has been made, that the annuity was in fact granted for a term of years determinable on lives, and yet that the memorial only states the grant to be for the lives of four persons therein named, it is sufficient to say that in the 53 G. 3. c. 141. s. 2. the schedule there given, according to which the memorial is to be drawn up, contains a column headed thus " Person or persons for whose life or lives the annuity or rent-charge is granted." It does not, therefore, mention any thing respecting a term of years; and it is quite sufficient that the act has been literally complied with. The same answer may be given to the second objection, that no description of the cestui que vies by residence or otherwise is stated in the memorial, nor whether the annuity be granted for their joint lives or the life of the survivor: for no description is required by the schedule, and where such description is to be given, as in the case of the witnesses to the deed, it is specifically mentioned. The third objection is, that the memorial does not mention the penalty contained in the warrant of attorney for which judgment is to be entered up; but that is not necessary, for that also is not mentioned in the schedule, and there is no reason why it should be done, inasmuch as the fifth section of the act gives to the party a power of obtaining copies of all such deeds or instruments, and he may, therefore, easily obtain all the requisite information. The material question, however, is, whether the sum of 700*l.* was retained so as to bring the case within the provision of the 6th section of 53 G. 3. c. 141.; and if so, whether this Court is bound, on that ground, to set aside the annuity. Now I am of opinion that the words of the 6th section give to this Court a discretionary power in such cases as the present. The words are " that if the consideration, or any part of

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of it, shall be returned to the grantee, or any of the notes in which it is paid be cancelled, or if it be expressed to be paid in money, but be paid in goods, or if any part be retained on pretence of answering the future payments of the annuity, or any other pretence, and if it shall appear to the Court, that such practices as aforesaid or any of them have been used, it shall and may be lawful for the Court to order every deed, &c. to be cancelled, &c." Now it seems to me, that these words import, upon the face of them, to refer to cases where improper practices exist, and that they give to the Court a discretionary power to examine whether any unfair advantage has been taken of the grantor, and if so, either to set aside altogether the annuity, or to impose such terms as the justice of the case may require. The words are only, that "it shall and may be lawful," and it is not added that the Court are required to order the deeds to be cancelled. Besides, this section is a transcript of the 17 G. 8. c. 26. s. 4., and upon that clause the case of *Cook v. Power* (a) is an authority in point. And the cases of *Berry v. Bentley* (b), *Poole v. Cabanes* (c), and *Drake v. Rogers* (d), are also authorities to shew, that the power of the Court is discretionary; for the Court could have had no authority to impose terms in these cases, if it had been imperative upon them to order the deeds to be cancelled. Then, if this be a discretionary power, we ought to look at the circumstances disclosed by these affidavits, and in that case it seems to me that there is no ground for setting aside the annuity. The proposal here came from the grantor himself, and

(a) 1 Taunt. 372.

(b) 6 T. R. 690.

(c) 8 T. R. 528.

(d) 2 Brod. & Bing. 19.

no advantage has been derived to the grantee, except incidentally by the increased value of the premises upon the security of which the money was lent. Here, too, all the money was paid over within three months after the granting of the annuity. Upon the whole, as it seems to me, the proper course will be, to discharge the present rule, upon the terms, that no annuity-interest shall be charged upon this sum of 700*l.* except from the period when it was finally paid.

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HOLROYD J. As to the first three objections, I think it unnecessary to add any thing to what has fallen from my Brother *Bayley*. On the last objection, also, I entirely concur with him, in thinking that the 6th clause of the 53 G. 3. c. 141. gives to the Court a discretionary power, and that it is not compulsory upon them ; and I think this would be the more necessary if, as it has been argued, the clause had applied to cases where the retainer was unaccompanied by any circumstances of a fraudulent nature. But I think the words “pretence” and “practices,” used in this section, imply something of an improper description, against which this section, which is penal in its consequences, was intended to provide ; and in this view of the case, I agree with what fell from Lord Chief Justice *Mansfield* in the case of *Cook v. Power*. Now, in a proceeding on a penal clause it ought clearly to appear that the practices have been such as clearly to shew, on the part of the grantee or his agent, some misconduct which has been prejudicial to the grantor. There is nothing of that sort disclosed in the present affidavits. The only object of the retaining the money was to insure the laying it out as the grantor proposed, viz. in the building of the houses in question.

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question. This, then, was a direct benefit to the grantor, the value of whose premises was increased by the money so laid out; but the grantee derived no other advantage than collaterally by the improvement of his security. I, therefore, entirely agree with my Brother *Bayley*, that this rule should be discharged, and upon the terms suggested by him.

Rule discharged accordingly. (a)

(a) *Abbott C. J.* and *Best J.* had left the Court before the argument had been concluded.

Saturday,
February 10th.

KENWORTHY *against* PEPPIAT.

A writ returnable on a dies non is altogether void, and cannot be amended by the Court.

DEHANY had obtained a rule calling on the plaintiff to shew cause why the alias bill of *Middlesex*, under which defendant had been arrested, and was then in custody, should not be set aside with costs for irregularity, and the defendant discharged out of the custody of the sheriff, on the ground that the writ was made returnable on *Friday* next after fifteen days of *St. Hilary*, which fell on the 2d of *February*, the Purification. *Parke*, in the mean time, obtained a rule calling on the defendant to shew cause why the writ should not be amended; and both rules were directed to be brought on together.

Parke now shewed cause against the first rule, and supported his own, and cited two MS. cases from 1 *Tidd*, 162. (6th ed.) *Bourchier v. Wittle*, 1 *H. Bl.* 291. *Davis v. Owen*, 1 *B. & P.* 342.

But

But the Court said, the writ being made returnable on a *dies non*, was altogether void; and was distinguishable from the cases of amendment of the party's name, where as a writ it was good, though not applicable to the particular case. The amendment prayed for would be making a new writ; and they discharged the rule for the amendment, and made absolute the rule for setting aside the writ and discharging defendant from custody, upon his undertaking not to bring an action for false imprisonment. (a)

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Bayley J. had left the Court.

(a) See *Reubell v. Preston*, 5 East, 291. *Inman v. Huish*, 2 N. Rep. 135. *Walker v. Hawkey*, 1 Marsh. 399.

The KING *against* The Justices of LANCASHIRE. *Saturday, February 10th.*

PARKE had obtained, on the last day of last *Michaelmas* term, a rule nisi for a writ of certiorari, to remove certain orders of magistrates of the county of *Lancaster*, made for the repayment by the treasurer of that county, to different high constables, of several large sums of money from the county rate, for their reasonable and extraordinary expences incurred in the execution of their duty in different cases of riot and tumult. The individual, at whose instance the writs of certiorari were applied for, made an affidavit in support of the rule; but the notices to the magistrates of the intention to apply for the writ, contained no mention of his name, and were all signed "*Lace, Miller, and Lace, attornies.*"

The notice required by 13 G. 2. c. 18. s. 5. for removing an order of Justices by certiorari, must state on the face of it the name of the party applying for the writ.

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The Solicitor-General, with whom were *Raine* and *Starkie*, shewed cause, and objected, that the notices were insufficient. By the 13 G. 2. c. 18. s. 5. it is enacted, that no certiorari shall be granted, unless it be duly proved upon oath, that the party or parties suing forth the same, have given six days notice in writing to the justices, to the end that they may shew cause against the issuing the certiorari; and, by 5 G. 2. c. 19., no certiorari is to be allowed, unless the party prosecuting it, before the allowance, enter into a recognizance for the prosecution of the writ without delay, and the payment of costs if he fail. Here it does not appear, by the notice, who the party suing out the writ is; it is signed by the attornies, but they do not add for whom they appear, and, for any thing that the Court can know, the party suing out the writ may be a mere stranger, who has not a right to interfere upon this occasion; and it is most important, that the justices should know this, because he is to be the party who is to enter into the recognizance, and to be ultimately responsible to them for costs.

Parke, contra. The object of the 13 G. 2. c. 18. s. 5. was merely to require the six days' notice, in order to enable the justices to appear, that they might shew cause: and here that object has been obtained, for the parties have appeared; as to the recognizance, it is only requisite that it should be entered into before the allowance of the certiorari, which may still be done. It is quite clear that the magistrates who made the order, must know who is the party suing out the writ, because he has made an affidavit in support of the rule.

Per

Per Curiam. The notice should be given by the party suing out the writ, and that circumstance should appear upon the face of the notice itself, for the object of it, stated by the statute, is to enable the justices to shew cause against the granting the certiorari, and they may shew, for cause, that the party suing out the writ was a stranger to the county, and not interested in the order. The justices, therefore, ought to have their attention called to the name of the party by the notice itself. The rule, therefore, must be discharged.

Rule discharged.

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The KING *against* The Justices of the Borough of CARMARTHEN and County of the same Borough.

Saturday,
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TWO justices of the borough of *Carmarthen*, on the 23d May, 1820, by their order, removed a pauper from the parish of *St. Peter*, in that borough, to the parish of *New Church*, in the county of *Carmarthen*. Against this order, the parish of *New Church* appealed, and in their notice of appeal stated their intention of appealing to the next quarter sessions of the borough of *Carmarthen*. At the next sessions (which, it appeared, were the general and not the quarter sessions) for the borough, held on the 21st September last, the parties accordingly attended, and applied for leave to lodge the appeal; but the magistrates refused the application.

Where by charter the magistrates of a borough, which was a county of itself, held only general sessions twice a year, and not quarter sessions: Held, that an appeal against an order of removal might be made to the next general sessions of the peace for such borough.

W. E. Taunton, in last *Michaelmas* term, obtained a rule nisi for a mandamus to the magistrates to hear the appeal.

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appeal. It appeared, from the affidavits, that the borough of *Carmarthen* was a county of itself, and that, by the charter, there were annually elected therein, six persons, called the Six Peers of the Borough, who, with the mayor and recorder, were magistrates of the borough, and had the power, twice in a year, to hold a court of view of frankpledge, and to summon the sessions of the peace within the borough, and to hold the sessions of the peace there, and to do and execute all things relating to the sessions of the peace, according to the custom of *England*; and that in the said court of view of frankpledge and sessions they had full power and authority to hear, execute, and determine upon all articles, misprisions, trespasses, and offences within the borough, which, according to law, belong to the court of view of frankpledge, or to the office of justices of the peace in their quarter sessions, or otherwise, to execute and determine. It also appeared, that the parish of *St. Peter* was co-extensive with the borough; but that three out of the eight magistrates did not reside in the parish.

Scarlett appeared for the magistrates, and stated that they were willing to proceed, in case the Court thought they had a jurisdiction over appeals against orders of removal.

Peake Serjt. and *Russell* shewed cause on behalf of the removing parish. There is nothing in the charter of the borough enabling the magistrates to do acts relating to the poor laws at their general sessions. Lord *Hale* lays it down, that a general sessions is perfectly distinct from a quarter sessions. By the 13 and 14 *Car. 2.*

c. 12.

12. s. 2., the appeal was given to the quarter sessions against orders of removal. But by 8 and 9 *W. 3. c. 30. s. 6.*, the phrase was altered to "general or quarter sessions." These two acts are, however, in *pari materia*, and should receive a similar construction. *Rex v. The Justices of London.* (a) Here, too, there are only three justices who can sit to determine this appeal. For, by 16 *G. 2. c. 18.*, all the rest are disqualified. And by 17 *G. 2. c. 38.*, it was provided, that in limited jurisdictions, where there are not four magistrates, the appeal must be to the county sessions.

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W. E. Taunton, contra, was stopped by the Court.

ABBOTT C. J. I am of opinion, that the true construction of the 8 and 9 *W. 3. c. 30.* is, that if there be an appeal to the sessions of a town which is a county of itself, where, by charter only, general sessions are held, it must be made to the general sessions. Here the magistrates are empowered to hear and determine upon all articles within the borough, which, according to law, belong to the office of justices of the peace in their quarter sessions, or otherwise, to determine. Now this is a very large expression, and comprehends, as it seems to me, a power to decide upon orders of removal. As to the other objection, it appears that there are three magistrates, at least, qualified to act, and a sessions of the peace may, it is known, be held before two magistrates. The act of parliament, to which a reference has been made, only applies to corporations or franchises, where there are not more than four justices

(a) 15 *East*, 652.

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altogether; and, besides, it does not apply to appeals against orders of removal. Upon the whole, therefore, I am of opinion, that this rule ought to be made absolute.

Rule absolute.

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SOUDEN'S Case.

Where a return to a habeas corpus stated that a vessel, with smuggled goods on board, was found at the fish-market, within the limits of the ancient town of *Rye*: Held, that it did not come within the 24 G. 3. sess. 2. c. 47. s. 1., by which, if a vessel be found at anchor, or hovering within the limits of any of the ports of this kingdom, or within four leagues of the coast thereof, with smuggled goods on board, she becomes liable to forfeiture.

IN this case, the return to the habeas corpus stated that the prisoner, on the 11th *September*, 1820, was duly convicted for that he being a subject of his majesty was found on board a certain ship or vessel, to wit, a passage vessel called *The Rose in June*, the said vessel being liable to forfeiture under the provisions of two acts of parliament, viz. 24 G. 3. sess. 2. c. 47. s. 1. and 42 G. 3. c. 82. s. 1., for having, after the passing of those acts and of the 45 G. 3. c. 121., been found at the fish market within the limits of the ancient town of *Rye*, in the county of *Sussex*, having on board divers large quantities of *East India* silk handkerchiefs, &c. It then stated that the prisoner was adjudged, in consequence thereof, to forfeit the sum of 100*l.*, and that for default of payment he was committed to the common gaol.

Lawes Serjt. objected to this return, that the offence was not sufficiently stated. This depends on the 24 G. 3. sess. 2. c. 47., by which it is enacted, that if any ship or vessel shall be found at anchor or hovering within the limits of any of the ports of this kingdom, or within four leagues of the coast thereof, having on board any goods liable to forfeiture, such ship shall be liable to forfeiture.

Here

Here it is only stated, that the ship was found in the fish market within the limits of the ancient town of *Rye*. Unless the ship be liable to forfeiture, the defendant has not incurred any penalty.

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SOMER'S
Case.

The Court, (after hearing *Shepherd*, in support of the return, who cited *Rex v. Hawkins* (a) and *Rex v. Elwell*, Bart. (b)) were of opinion, that the objection was well founded, the corpus delicti not being sufficiently stated, inasmuch as it was quite consistent with the return that the vessel might be in the fish market in the ancient town of *Rye*, but drawn up on the land, which would clearly not be a case within the statute.

Per Curiam. The prisoner must be discharged.

(a) *Fort.* 272.(b) 2 *Str.* 794.

NASH'S Case.

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THIS case was similar to *Deybel's* case, see p. 243.; the return, after stating correctly, that the prisoner was found on board a smuggling vessel liable to forfeiture, and that he was a seaman, &c. proceeded to state that he, being such subject and seafaring man as aforesaid, and not being only a passenger on board the vessel, at the time she became liable to forfeiture, was afterwards, to wit, on, &c. carried before *George Dell*, Esq. mayor of *Dover*, a justice, &c. residing near *Dover*, the port into

Where the return to a habeas corpus stated that an *English* seaman being found on board a ship liable to forfeiture under 45 G. 3. c. 121. s. 1., was carried before a magistrate, and upon due proof, as by the statute in that case made and provided is required, was

committed, &c.: Held, that this was insufficient; and that it was necessary to state distinctly what proof was given, in order that the Court might see whether it was the due proof required by the 7th section of the act.

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which the vessel had been carried, and upon due proof as by the statute in that case made and provided is required, was committed to answer such information and abide such judgment as might be given. It then proceeded as in *Deybel's* case to set forth an impressment and detainer.

Larres Serjt. now objected that this return was insufficient. It may be admitted, that in the present case it is sufficiently stated that the vessel was liable to forfeiture within the 45 G. 3. c. 121. s. 1.; but here the parties have pursued the power given by the 57 G. 3. c. 87. s. 6., by which act, in case any person found on board a vessel liable to forfeiture under 45 G. 3. c. 121. be fit and able to serve his majesty in his naval service, he shall, upon such proof as by the said act of the 45th year aforesaid, or any other act, is required, be committed by such justice to prison, to answer such information and abide such judgment as may thereon be given against him in that behalf, whereupon he shall be liable to be impressed. Now this section refers to the proof required by the 45 G. 3. c. 121. s. 7., where it is stated that it shall be lawful for the justice, upon proof on oath by one or more credible witness or witnesses that such person was found on board of a vessel under such circumstances, unless he should prove to the satisfaction of the justice that he was only a passenger, to bind over such person to answer to any indictment or information; so that it appears that a particular species of proof was required by the statute. In this case, it is only stated that the prisoner was committed upon due proof as required by the statute; but whether such proof be or be not within the statute is a question of law. The return ought, therefore,
to

to have stated what proof was given before the magistrate, in order that it may be ascertained whether his judgment was correct. The Court then called on the other side.

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Jervis, contra, contended, that the commitment was sufficient, being only a warrant of commitment to answer certain charges, and not a conviction, in which case, he admitted that it would not have been sufficient; and he added, that in drawing the return, it had been judged proper to follow strictly the words of the commitment by the magistrate, that the party might not be deprived of the objection upon which the writ of habeas corpus had been originally obtained.

ABBOTT C. J. This act of parliament of the 57 G. 3. c. 87. is one highly beneficial in preventing frauds upon the revenue; but at the same time, inasmuch as it trenches very strongly on the liberty of the subject, we must take care that its provisions are strictly pursued. This averment is one of a conclusion of law; it states that upon due proof the party was committed. Now whether that was so, this return does not enable us to judge; for unless we know what the proof was which was given, it is impossible for us to tell whether it was the proof required by the act of parliament. The circumstances stated in the introductory part of this return, seem to me to be quite sufficient to warrant this commitment; and if it had been stated, that upon due proof of the matters before mentioned, the prisoner was committed, I should have thought it sufficient. In the present case, however, the prisoner must be discharged.

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BAYLEY J. concurred.

~~NOTED~~
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HOLROYD J. The power of the magistrate to commit depends on the proof before him; and the rule is, that where a limited authority is given, it must be shewn to have been strictly pursued. Here it is only stated, that on due proof the justice committed; but he may suppose that to be due proof which is not the proof required by the statute. He ought, therefore, to state what it was, and then the Court will be enabled to form a judgment whether he has judged right.

BEST J. concurred.

The prisoner was discharged.

Monday,
February 12th.

The KING *against* The Justices of MIDDLESEX.

The Court of K. B. have no jurisdiction to grant a mandamus to magistrates to make an order of maintenance on a particular parish.

BOLLAND, in last *Michaelmas* term, obtained a rule nisi for a writ of mandamus, to *R. B.* and *J. M.*, Esquires, two of the justices of the peace for the county of *Middlesex*, commanding them to make an order on the churchwardens and overseers of the poor of the parish of *Christ Church*, for the relief of a bastard child, residing in the parish of *St. Stephen's, Coleman Street*, in the city of *London*. It appeared, by the affidavits, that *Alice Ramsey*, a single woman, being resident in the parish of *Christ Church*, became pregnant with a bastard child, and that, on the 4th *August* 1820, she was, by an order under the hands and seals of two justices, directed to be removed to the parish of *Bilder-*
ston,

ston, in the county of *Suffolk*, as the place of her last legal settlement. On the same day, however, in consequence of her advanced state of pregnancy, the execution of the order was suspended, and she was delivered of the bastard child in question, in the parish of *Christ Church*, on the 5th *August*. The order was never served on the parish of *Bilderston*, nor was the pauper ever removed thither; but on the 14th *September*, she was, at the instance of the parish officers of *Christ Church*, who bought the ring and paid the marriage fees, married to *Thomas Ramsey*, the putative father of the child. No order of bastardy was ever obtained against *Thomas Ramsey*, who was a settled inhabitant of the parish of *St. Stephen's, Coleman Street*, and with his wife and the child, chargeable to that parish.

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Andrews shewed cause, and contended, that the child being born under a suspended order, by the 35 G. 3. c. 101. s. 6., was settled in the place of the legal settlement of *Ann Ramsey* at that time. Now it appears that that place was *Bilderston*; at any rate, there is no ground for saying that she was settled at *Christ Church*, the magistrates, therefore, have no authority to make this order, and there is no instance where this Court have interfered upon such subjects.

Bolland, contra. The child is legally settled in *Christ Church*; for although it was born under a suspended order, yet, as that order was never executed, it is the same as if it had never existed; and then there is nothing to take the case out of the ordinary rule, that a bastard is settled where it is born. And as to the jurisdiction of the magistrates to make an order of main-

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 ———
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tenance, in the case where a child within the age of nurture is resident in a place different from its place of settlement, he cited *Rex v. Hemlington* (a), *Simpson v. Johnson* (b), *Rex v. Saxmundham* (c), *Rex v. St. Giles in the Fields*. (d) Here, the only mode of enforcing this right, is by application to the Court for a mandamus.

Cur. adv. vult.

ABBOTT C. J. now delivered the opinion of the Court. We have considered this question, and we are all of opinion, that this Court ought not to grant a mandamus in the present case. It is the ordinary practice of the Court to grant this writ, to compel magistrates to hear and determine a case in which they have a jurisdiction to hear, but have refused altogether to exercise it: but there is not an instance which can be cited, where the Court have granted a mandamus to justices to compel them to come to any particular decision, which would be the case if we were, upon the present occasion, to order them to make an order of maintenance upon the parish of *Christ Church*. We had at one time thought that it might be desirable to give our opinion as to the merits of this case, for the guidance of the magistrates; but, upon re-considering the matter, we think that we ought not to give an extra-judicial opinion upon the case. Upon the ground, therefore, that we think the Court have no power to grant a mandamus to the magistrates, to compel them to make such an order of maintenance, we are all of opinion that this rule ought to be discharged.

Rule discharged.

(a) *Cald. G.*
 (c) *Fort. 507.*

(b) *Doug. 7.*
 (d) *Burr. S. C. 2.*

1821.

MAY *against* GWYNNE.Monday,
February 12th.

A RULE had been obtained, calling on the plaintiff in this case, to produce and permit the defendant to inspect and take copies of certain papers, belonging to the parish of *Hammersmith*, which were in his possession. It appeared that the defendant had, by the authority of the vestry, made a report in writing respecting the conduct of the plaintiff, founded, as it was stated, on the inspection of certain documents then in the parish chest, but now in the possession of the plaintiff. This report having been published, an action was brought by the plaintiffs for a libel, which the defendant wished to justify, and these documents were necessary for that purpose; and the defendant contended, that he, being an inhabitant of the parish, was entitled to see and take copies of them. It was doubtful, in the affidavits, whether the plaintiff or another person, was legally the vestry-clerk of the parish.

The Court will not compel the vestry clerk of a parish to produce and permit copies to be taken of documents from the parish chest in his custody, for any other than parochial purposes.

Scarlett and *Gurney* shewed cause, and contended, that the plaintiff was not bound to produce the papers for any other than the ordinary parish purposes, they being in his custody as vestry-clerk; but they added, that he was willing to undertake to produce the documents at the trial.

The Solicitor General, in support of the rule, contended that, upon the affidavits, it was doubtful whether the plaintiff was legally the vestry-clerk; and that,

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as an inspection of these documents was absolutely necessary to the defendant's case, they having been the foundation of the report, for the publication of which the action was brought, the Court would compel the plaintiff to permit the defendants to see and take copies of them. As to the offer to produce them for the first time at the trial, it could be of no benefit to the defendant.

ABBOTT C. J. This is a motion of the first impression; and I am of opinion that the Court ought not to order a plaintiff to furnish evidence against himself. If the plaintiff be legally the vestry-clerk, then he has a right to the custody of these documents; and if he be not, then the person really entitled to the office may by mandamus obtain possession of them. But the defendant has no such right; and I think that we ought not in this case, which is for a libel, to grant the defendant's application. If the papers had been wanted for the purpose of advancing any parochial right, the case would have been different.

Rule discharged with costs.

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DOE, on the Demise of DORMER, *against*
WILSON.*Monday,*
February 12th.

THIS was an action to recover possession of copyhold messuages, lands, and buildings, held of the manor of *Crazley*, otherwise *Crazley Hall*, in the county of *Herts*. The declaration in ejectment was served on the 31st *May*, 1817, and the demise was laid on the 2d of *April* preceding. At the trial, before *Graham B.*, at the *Lent* assizes, 1818, a verdict was found for the plaintiff, subject to the opinion of the Court on the following case.

Samuel Fludyer, being seised to him and his heirs, at the will of the lord, according to the custom of the manor, of the premises in reversion, expectant on the determination of an estate for life therein in *Sarah Willett*, contracted with the Honourable *John Mordaunt* to sell and convey to him the said estate and interest; and in consideration of 900*l.* by him paid to *Samuel Fludyer*, he, on the 24th *March*, 1762, surrendered the said premises, and the reversion and reversions, and all the estate, right, title, and interest of the said *Samuel Fludyer*, of and in and to the same, into the hands of the lord of the said manor, out of court, according to the custom of the manor, to the use and behoof of the Honourable *John Mordaunt*, Esq., and *Elizabeth* his wife, for and during the term and terms of *their natural lives, and the life of the longer liver of them, and from and after the decease of the survivor of them, to the right heirs of the survivor of them for ever*, subject,

never-

A copyhold was surrendered to the use of husband and wife, for their natural lives and the life of the longer liver of them, and from and after the decease of the survivor of them, to the right heirs of the survivor for ever: Held, that the husband and wife took a vested estate, not only for their joint lives, but also for the life of the survivor, with a contingent remainder in fee to the survivor.

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nevertheless, to the estate for life of *Sarah Willett*. And at the next court-baron, holden on the 15th *April*, 1762, *John Mordaunt* and *Elizabeth* his wife were admitted to the premises, pursuant to the said surrender, to hold to the said *John Mordaunt* and *Elizabeth* his wife, for their natural lives, and the life of the longer liver of them; and from and after the decease of the survivor of them, to the right heirs of such survivor for ever (subject, nevertheless, to the life estate of *Sarah Willett*) of the lord of the said manor, at the will of the said lord, according to the custom of the said manor. On the 31st *March*, 1767, the said *John Mordaunt* and *Elizabeth* his wife (the latter being first solely examined by the steward) surrendered the premises, out of court, into the hands of the lord, by the hand and acceptance of the steward, according to the custom of the said manor, to the use and behoof of *Henry Pratt*, Esquire, and *Elizabeth* his wife, for their lives, and the life of the longer liver of them, and after the decease of the survivor, to the right heirs of the said *Henry Pratt*, for ever, subject, nevertheless, to the aforesaid estate for life of the said *Sarah Willett*; and at a court-baron, holden on the 7th *April*, 1767, *Henry Pratt* and *Elizabeth*, his wife, were admitted to the said premises, pursuant to the said last-mentioned surrender, and to the above-uses thereof. On the 5th of *July*, 1767, *John Mordaunt* died, leaving the said *Elizabeth Mordaunt*, his widow, him surviving, who, on the 23d *January*, 1768, married the Honourable *Charles*, afterwards Lord *Dormer*, and died on the 22d *September*, 1797, leaving the lessor of the plaintiff, her only son and heir at law. Lord *Dormer* died on the 29th *March*, 1804. On the 27th *May*, 1775, *Henry Pratt* and *Elizabeth* his wife (the latter

latter being first duly examined) surrendered the said premises, out of court, to the use and behoof of *William Wilson*, his heirs and assigns for ever, subject to the aforesaid estate for life of the said *Sarah Willett*; and at the next subsequent court, holden on the 6th *June*, 1775, the said *William Wilson* was accordingly admitted to the premises, to hold to him and his heirs for ever, subject to such life-estate of *Sarah Willett*. *Sarah Willett* died upon the 13th *April*, 1777, whereupon the said *William Wilson* immediately took possession of the premises, and enjoyed the same from that time until his death. On the 29th *December*, 1807, *William Wilson* died, leaving the present defendant, his only son and heir at law, him surviving, who was, on the 9th *December*, 1808, admitted tenant to the premises, to hold to him and his heirs; and he entered and still is in possession of the same. The case was argued on a former day in this term, by

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Sugden, for the plaintiff. The question in this case is, whether the ejectment be barred by the statute of limitations. If Mr. and Mrs. *Mordaunt*, by the surrender of 1767, conveyed to *Pratt* an estate only for their joint lives, and not for the life of the survivor; Mrs. *Mordaunt*, having survived her husband, might have entered on the premises upon the death of Mrs. *Willett* in 1777. If, on the other hand, they conveyed to *Pratt* the estate for the life of the survivor, no right of entry accrued until the death of Mrs. *Mordaunt* in 1797, and then the ejectment is in time. The quantity of estate conveyed to *Pratt*, must depend upon the limitation to Mr. and Mrs. *Mordaunt* under the surrender of *March*, 1762. Now that was an estate for their joint lives, and for the life of the survivor, with a contingent remainder in fee

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to the survivor. In *Co. Litt.* 191 *a.* it is laid down that if lands be letten to two for term of their lives et eorum alterius diutius viventi, and one of them granteth his part to a stranger, whereby the jointure is severed, and dieth, here shall be no survivor, but the lessor shall enter into the moiety, and the survivor shall have no advantage of these words, et eorum alterius diutius viventi, for two causes. First, for that the jointure is severed. Secondly, for that those words are no more than the common law would have implied without them, and expressio eorum quæ tacite insunt nihil operatur. [*Bayley J.* When Mr. *M.* died, what estate vested in Mrs. *Mordaunt* ?] Mr. and Mrs. *M.* were tenants by entireties ; that estate could not be severed, and therefore it would continue in Mrs. *Mordaunt* after her husband's death, and she, as survivor, would take in consequence of the first limitation. In *Litt. s.* 283. it is laid down, that "if lands be given to two men and the heirs of their two bodies begotten, the donees have a joint estate for the term of their two lives, and yet they have several inheritances ; for if one of the donees have issue and die, the other which surviveth shall have the whole by the survivor for term of his life, and if he which surviveth hath also issue and die, then the issue of the one shall have the one moiety, and the issue of the other shall have the other moiety of the land, and they shall hold the land between them in common, and they are not joint-tenants, but tenants in common," and in *s.* 285. it is laid down, that "if lands be given to two and the heires of one of them, this is a good jointure, and the one hath a freehold and the other a fee simple ; and if he which had the fee dieth, he which hath the freehold shall have the entiertie by survivor
for

for terme of his life." These authorities clearly establish that Mr. *M.* and Mrs. *M.*, by the surrender of *March*, 1762, took a joint estate for their lives, with a contingent remainder in fee to the survivor. By their surrender of *March*, 1767, the estate which was vested in them for their lives and for the life of the survivor, passed, but the contingent remainder in fee was not affected by it; for such a remainder cannot be transferred by surrender, because no person is tenant of the remainder, and it is settled that a surrender cannot operate by estoppel, *Goodtitle v. Morse* (a), *Doe v. Tomkins* (b). Upon the death of Mr. *Mordaunt*, the remainder became vested in his widow, who survived. During her life, however, *Pratt* and his wife, the surrenderees, were entitled to the possession, and consequently no right of entry accrued till the death of Mrs. *Mordaunt*, which did not happen till 1797, within twenty years of the bringing of this action, and the statute of limitations is therefore no bar.

The *Solicitor General*, contra. By the surrender of 1762, Mr. and Mrs. *Mordaunt* took an estate by entireties, during their joint lives, with a contingent remainder in fee to the survivor, taking effect immediately upon the decease of the person who should first die. Upon the death of Mr. *M.*, in 1767, the fee vested absolutely in Mrs. *M.*, and from that time the statute of limitations began to run. In *Green*, on the demise of *Crewe v. King* (c), the surrender was to husband and wife and the longer liver of them, and after the death of the longer liver of them, to the right heirs of the hus-

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(a) 3 T.R. 365.

(b) 11 East, 185.

(c) 2 Bl. 1211.

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band and wife for ever. The Court held this to vest an immediate fee-simple in the husband and wife by entireties; but *Blackstone J.* is reported to have said, "Supposing it to be a grant to husband and wife for their lives, with a contingent remainder to the survivor in fee, the effect would be just the same; for both being seised of the entirety for their joint lives, the husband could not, by any alienation, destroy the particular estate, so as to bar the contingent remainder: and then, upon his death, she (as survivor) became absolutely seised, in her own right, of the remainder in fee simple." Here the fee is clearly contingent, and the prior limitation nearly verbatim with the first in *Green v. King*. The opinion of *Blackstone J.*, therefore, is an authority to shew, that upon the death of Mr. M., the fee immediately vested in Mrs. M. In *Vick v. Edwards* (a) lands were devised to B. and C., and the survivor, and the heirs of such survivor, in trust to sell. Lord Chancellor Talbot held, that the fee was in abeyance, but that the trustees, by joining in a fine, might make a title to a purchaser by estoppel; and *Clarke v. Sydenham* (b) is an authority to shew, that, when once the survivor is known, the fee is vested in him. It is said, however, that although Mrs. M. took a contingent remainder in fee simple, yet that she and Mr. M. were entitled to a vested estate during their joint lives, and during the life of the survivor; and consequently, that that estate, during the life of the survivor, not resting in contingency, was transferable at law, like any other vested estate, and was, in fact, transferred, by the surrender of 1767, to Pratt. That, however, must depend upon the nature of the

(a) 3 Peere W. 372.

(b) 1elv. 85.

estate taken by a surviving joint-tenant for life. Now where an estate is granted to *A.* and *B.*, during their lives, or, which is the same, during their lives and the life of the survivor of them, they take an estate during their joint lives, with a mere possibility of remainder by survivorship, which is not grantable at common law. For if the estate of the survivor was vested, it must follow that each joint-tenant would, upon severance of the joint-tenancy, be entitled to a moiety during his own life, and for the life of his co-joint-tenant. In *Eustace v. Scowen* (a) the law is thus laid down, “ Et per les 4 justices fuit resolve et issint adjudge que un joint-tenant n’ad ascun estate mes pur son vie demesne mes solment possibilitie de survivor pur le part de son companion, et quant il grant ouster son estate ou fist partition sur son mort son part resortera al reversion et le possibilitie de survivor ale et le grantee n’ad forsque estate pur son vie;” and in the passage cited from *Co. Litt.* 191. *a.* it is stated, “ that if lands be letten to two for the term of their lives, and the life of the longer liver, and one of them granteth his part to a stranger, whereby the jointure is severed and dieth, there shall be no survivor.” Now, if the estate for the life of the survivor was vested during the joint lives, the act of one of the joint-tenants could not destroy the estate of the survivor. That, therefore, is an authority to shew, that the estate, during the life of the survivor, is not a vested remainder, but a mere possibility of a remainder. Mr. *Butler*, in his note to this passage, states, that the grant of an estate to two, and the survivor of them, and the heirs of the survivor, does not make them joint-

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(a) *Sir W. Jones*, 55.

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tenants in fee, but gives them an estate of freehold, during their joint lives, with a contingent remainder in fee. (a) According to his opinion, therefore, the first estate is determined upon the death of either of the joint-tenants, which would not be the case if the estate for the life of the survivor were a vested interest. This construction of the limitation is consistent with that which prevails in similar cases. Thus a limitation to *A.* and *B.* and the survivor of them, and the heirs of such survivor, creates a contingent remainder in fee, to take effect immediately upon the decease of the one first dying. Now it would be inconsistent with that rule, and be contrary to the general simplicity of the common law, to hold that under a limitation to *A.* and *B.* during their lives, and the life of the survivor of them, and after the death of the survivor, to the heirs of such survivor, *A.* and *B.* should take a vested estate, grantable at the common law by them during their lives, and during the life of the survivor, with a contingent remainder in fee to the survivor, commencing from the death of such survivor; or, in other words, that the chance of survivorship should be partially grantable, and not grantable to the full extent.

Sugden, in reply. The effect of the argument on the other side is to give as small a vested estate as possible. The other is the natural construction; for the grant to Mr. and Mrs. *M.* “for and during the term and terms of their natural lives, and the life of the longer

(a) See 2 *Roll. Ab.* 150. pl. 5. 2d Resolution in *Marbin v. Loley*, *Noy*, 157, 158. *Bro. Ab. Joint-Tenants*, pl. 28.

liver of them," is one connected sentence without a break, and the next limitation begins, "from and after the decease of the survivor of them." In point of grammatical construction, there is no contingent limitation till the decease of the survivor. The note of Mr. *Butler* to *Co. Litt.* 191. *a.* has nothing to do with the present question; for the expression used by him there is merely with reference to the time when the contingent remainder vests; and there can be no doubt that it vests upon the decease of either of the joint-tenants for life. If Mrs. *M.* had not granted away her life-estate, it would have merged in the fee. *Vick v. Edwards* has always been considered a case of doubtful authority; but the mode in which conveyances are taken, in cases similar to *Vick v. Edwards*, shews the opinion of the profession, that the trustees can convey a vested estate for their joint lives, and the life of the survivor of them. It is impossible to contend that the right of survivorship between joint-tenants partakes of the nature of a contingent remainder. It is part of the quantity of estate contained in the original limitation; and here the additional words only express the operation of law.

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ABBOTT C. J. now delivered the judgment of the Court, and after stating the facts of the case, proceeded as follows. It is, therefore, necessary to consider in this case, with respect to the statute of limitations, whether Lady *Dormer* could have entered on the death of Mrs. *Willett*, and this depends upon the effect of the surrender made to Mr. and Mrs. *Mordaunt* in 1762, and

(a) See *Fearne on Contingent Remainders*, 6th ed. p. 357;

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of the surrender made by them in 1767. The latter was made to a purchaser for a valuable consideration, and was undoubtedly intended to pass the whole remainder expectant on the death of Mrs. *Willett*, and Mrs. *Mordaunt* was examined apart; it must, therefore, receive the utmost effect of which it was legally capable, and be construed to pass all that the surrenderors could lawfully convey. Now the quantum of estate which they might lawfully convey must be commensurate with the quantum of estate that was actually vested in them at the time of their surrender; and this by the effect of the surrender to them was an estate held in entirety for their joint lives and the life of the survivor. This quantum of estate was subject, in itself, to no contingency, although it was uncertain which of the two might be the survivor: To this estate was superadded a further estate in fee, which was contingent in respect of the person in whom it might afterwards vest. And although it be true, that if the contingency had been changed into a certainty by the death of Mr. or Mrs. *Mordaunt* while the estate, originally granted to them, remained in the original grantees, the survivor would, in that event, have become seised in fee, by the union of the two estates, for life and in fee in the same person: yet this effect was prevented by the previous surrender to *Pratt*, who, in our opinion, took, under that surrender, an estate for the lives of Mr. and Mrs. *Mordaunt*, and the survivor of them. The contingent remainder to the right heirs of the survivor of Mr. and Mrs. *Mordaunt* could not pass by their surrender, and was not defeated or destroyed by it. The consequence, in our opinion, is, that upon the death of Mr. *Mordaunt* this remainder vested in his widow as a remainder expectant upon an estate then vested

vested for her life in their surrenderee, who was tenant pur autre vie. This appears to us to flow from the principles laid down by *Littleton*, as quoted by Mr. *Sugden* in his argument. Suppose the estate had been surrendered to Mr. and Mrs. *Mordaunt* for their joint lives and the life of the survivor, with remainder to the eldest of the four sons of *A. B.* a stranger who should happen to be living at the death of Mr. or Mrs. *Mordaunt*, whichever of the two should die first. In such a case the contingency would have been determined by the death of Mr. *Mordaunt*, and the remainder would then have vested as a remainder in the person answering the description expectant on the death of Mrs. *Mordaunt*. And how does this differ from the effect of the two surrenders in the present case, considering that effect to be to constitute a contingent remainder in the survivor of Mr. or Mrs. *Mordaunt*, expectant upon an estate held by a stranger for the life of that survivor? And might not Mrs. *Mordaunt* become, upon the death of her husband, seised of a remainder expectant on an estate then held for her life by *Pratt* or the person claiming under him? We think that, upon the events, she might and did become seised of such an estate, descendible to her heir, and who, therefore, had twenty years allowed for his entry after her death, upon which event the right of entry first accrued. And this opinion does not impugn either of the cases cited on the other side. In *Vick v. Edwards*, the object was to pass the fee, and Lord *Talbot* thought that might be done by a fine, operating by way of estoppel. A surrender of a copyhold cannot have that effect. In *Green v. King*, the husband only had surrendered; and it was held, that his surrender had no effect upon the estate of his wife. In the pre-

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sent case Mrs. *Mordaunt* joined in the surrender. Upon the whole, therefore, we are of opinion, that there must be

Judgment for the Plaintiff.

Thursday,
February 1st.

The KING *against* BURDETT.

Where an information alleged that a libel was published of and concerning the government of the country, and the libel did not, in express terms, charge the acts to have been done by the government or its order, the Court are to take the whole libel together, to interpret it in the way in which ordinary persons would understand it, and to judge, from the whole tenor of it, whether it be written

SCARLETT moved in arrest of judgment, and contended, first, that it did not appear on the record with sufficient certainty that the libel was published of and concerning the government of this realm, there being no introductory averments stating any facts, so as to shew with certainty that the libel in the record applied necessarily to the government; and, secondly, that it did not appear with sufficient certainty concerning what troops the libel was published, it being stated only that it was of and concerning certain troops. (a) He referred to *Rex v. Horne*, Cowper 672.; *Ball v. Roane*, Cro. El. 308.; and *Rex v. Shipley*, 21 Howell, St. Tr. 1042.

Cur. adv. vult.

of and concerning the government; and the Court having come to this conclusion, such an information was held good after verdict, although the record did not contain any averment of extrinsic facts, in order to shew that the libel was written of and concerning the government.

Where the information alleged that the defendant, intending to cause it to be believed that divers subjects of our lord the king had been inhumanly killed by *certain* troops of our lord the king, published a libel of and concerning the *said* troops; and the only innuendo in the libel was applied to the word *dragoons*, meaning the *said* troops of our *said* lord the king, and meaning thereby that divers liege subjects of our lord the king had been inhumanly cut down and killed by the *said* troops of our *said* lord the king: Held, after verdict, that this was sufficiently certain, without defining what particular troops were meant.

Where a defendant was convicted of a libel, which, on the face of it, purported to have been written in consequence of his having read a statement of facts in different newspapers, an affidavit that he did read such statements in such newspapers may be received in mitigation of punishment; but an affidavit that the facts contained in those statements were true, is not admissible.

(a) See the information, ante, p. 115.

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ABBOTT C. J. This was an information which charged that the defendant unlawfully, and intending to excite discontent, disaffection, and sedition amongst the liege subjects of the king, and particularly amongst the soldiers of the king, and to excite the liege subjects of the king to hatred and dislike of the government of the realm, and to insinuate and cause it to be believed by the liege subjects of the king, that divers of the liege subjects of the king had been inhumanly cut down, maimed, and killed by *certain* troops of our lord the king, on the day, and at the time mentioned, unlawfully and maliciously did compose, write, and publish, and cause to be composed, written, and published, a certain scandalous, malicious, and seditious libel of and concerning the government of this realm, and of and concerning the *said* troops of our lord the king, according to the tenor and effect following. The alleged libel is then set forth upon the record, and only one innuendo introduced, which follows the word *dragoons*, and is as follows: "Meaning the said troops of our said lord the king, and meaning thereby that divers liege subjects of our lord the king had been inhumanly cut down, maimed, and killed, by the said troops of our said lord the king." A motion has been made to arrest the judgment upon two objections: the first is, that it does not sufficiently appear upon this record that the libel is written of and concerning the government of the realm; and the second is, that that part which relates to the troops of our said lord the king is indefinite, and that it should rather have been charged, if at all, as a libel upon the troops generally, than as "of and concerning the said troops." It was contended that the Court, in forming its judgment in this case, is to look at the

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against
BUNNEN.

Saturday,
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record alone ; and that if an offence be not there charged with sufficient certainty, we cannot aid the imperfection of the record by any extrajudicial knowledge we may have of any supposed facts and circumstances to which the writer may be imagined to refer. For the general doctrine of the law upon this subject, we were most properly referred to the judgment given by Lord Chief Justice *De Grey*, in the case of *The King v. Horne*. That judgment has been universally considered to contain the best and most perfect exposition of the law upon this subject, and is equally to be admired for the learning and sound sense that is to be found in it, as for the plain and unaffected manner in which the whole is drawn up.

Our judgment upon the present occasion is founded upon the application of the principles there laid down to the case now before the Court. We were also referred to the case of *The King v. Shipley*, where the judgment was arrested. Now, upon looking at the record in that case, I find that in two instances, at least, the words “the king,” occurring in the pamphlet, are alleged by innuendo to mean “our said lord the king ;” and, in one instance, the expression “the parliament,” occurring in that pamphlet, is asserted by that information to mean “the parliament of this country.” But upon reading the whole of that pamphlet, it is obvious that its general character was that of an abstract and hypothetical composition, in parts perfectly abstract, in other parts hypothetical ; and there was not any averment on the record to shew that those things, which were there put by way of hypothesis and supposition, were intended to apply to the existing state of the country, nor to the existing sovereign or parliament ;

ment; and I conceive the ground of the judgment of the Court in that case, of which we have not a full and perfect report, must have been that that particular publication was in its own nature so abstract and so hypothetical, that without something more than appeared upon that record, the Court could not pronounce those matters to be scandalous or defamatory, of and concerning the kingdom or the king. But the record in the present case is of a very different nature. The writer of the paper in question begins by mentioning his having read, in some papers that had arrived late the day before, some matters which had filled him with indignation and horror; he therefore begins by saying, in plain terms, that he has read something which is to be the subject of what he shall hereafter say. Then the question is, upon this part of the case, whether that which follows must not be understood by the Judges (as undoubtedly it will be by all other men) to be of and concerning the government of this kingdom, and calculated to excite disaffection and dislike to that government. It is true, that the writer has not distinctly asserted that that act of the drag or military to which he is adverting was done by the authority, or that it even had the approbation, of the government. We are, however, to judge from the whole tenor and import of that writing, whether it does not mean to convey to the minds of his majesty's subjects that much has been done amiss by the existing government. Is it possible to understand as alluding to any other than the government of the country, that which is said very early in this paper concerning the use of a standing army in time of peace, or the reference to the wisdom of our forefathers in dismissing the *Dutch* guards of
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King *William*? The passage by which the gentlemen of *England* are strongly invited to exert themselves to uphold the rights and liberties of their country; that by which other persons are invited to join in the general voice, and to demand justice and redress, and to head public meetings for that purpose; the supposition that death by military execution may be the consequence of meeting, but that a man can never die so well as in advocating the cause of the liberties of his country; the allusion to the abdication of King *James*, and the conduct of the military on the acquittal of the seven bishops; and the contrast, which immediately follows, between that which is supposed to have been the existing law of military discipline at that time and the present; — are all, as it seems to me, capable of only one application. It seems to me, therefore, to be utterly impossible that any person should read this paper without saying, upon the whole, that it is a strong appeal to the people of this country to exert themselves in maintenance of the rights and liberties of the country, which rights and liberties cannot have been invaded and put in jeopardy by the unauthorised act of particular troops, but only by some act of the existing government of the country. For these reasons, we are of opinion, that reading and understanding this as Judges, in the way in which other men should read and understand it, we are bound to say that it is a paper plainly importing in itself to be of and concerning the government of the country. It appears to me that there is no other alternative; for if we do not say that it is of and concerning the government, we can only say that it is altogether without application.

I come

I come now to the second objection, viz. the want of certainty in the manner in which the troops are mentioned. I take it to be perfectly clear, that slanderous matter on any part of the king's troops might be the subject of criminal prosecution, although the writer should not define what particular part of the troops were referred to. Let us look, then, to the whole of this record, and see what the defendant had in view. It is charged, that intending to insinuate and cause it to be believed that divers of the liege subjects of our lord the king had been inhumanly cut down, maimed, and killed by certain troops of our lord the king; (that is, by part of the troops of our lord the king,) he published of and concerning the said troops of our lord the king; (that is, of and concerning some troops, an undefined part of the troops of our lord the king;) certain matters, and having used the word dragoons, it is averred that he used that word to denote the said troops; that is, those troops before mentioned, whom it was his object to bring into hatred and contempt. Understanding that to be the plain and obvious meaning of this record, taken together, we are of opinion, that the objection cannot prevail. But, even supposing that it was imperfectly and indistinctly charged, yet, taking this as a libel of and concerning the government, and of and concerning certain persons not sufficiently ascertained and defined, the latter part must be rejected, and the information would then stand as a charge of a libel of and concerning the government. For these reasons, we are of opinion, that no rule ought to be granted.

Rule refused.

The defendant, in mitigation of punishment, put in an affidavit, stating that he had read in certain newspapers

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papers an account of the transactions represented to have taken place at *Manchester* on the 16th of *August*. They stated, that the yeomanry cavalry rode in among a large body of people assembled for the purpose of petitioning for a reform in parliament, and that several persons were killed, wounded, and maimed. The affidavit then stated, that the defendant, considering that the unprovoked aggression committed on an unarmed multitude, and the mischiefs inflicted by the cavalry, demanded the most immediate and strongest expression of abhorrence, under the impression of strongly excited feelings of indignation wrote the address, but denied that he had any seditious intention therein, or any other intention than that of rousing the attention of his countrymen to a transaction which he considered as a gross and wanton outrage upon the liberty of his majesty's subjects, and of exciting an early attention to the extreme danger of substituting military force for the civil power in the preservation of the peace. To this affidavit no objection was made. Other affidavits were then tendered on the part of the defendant, to shew that the statement contained in those newspapers was founded in truth.

The *Attorney-General* contended that these affidavits could not be received. If such affidavits were received, counter affidavits on the part of the prosecution must be received also; and the consequence would be, that the Court would be compelled to try upon affidavit, the question whether the persons composing the yeomanry cavalry at *Manchester*, on the 16th of *August*, had or had not been guilty of a crime. In *The King v. Finnerty*, in *Hilary* term, 1811, affidavits of the truth of the facts
stated

stated in the libel were refused in mitigation of punishment. [*Best J.* In *The King v. Draper*, in *Easter term*, 1809, the Court received such affidavits, but I believe it was with consent of the prosecutor.] Here the libel, on the face of it, appears to be founded on the statement which the defendant read in certain newspapers. He was entitled, therefore, to shew, that he did read such statement in such newspapers; but his offence cannot be altered by the truth or falsehood of those statements, and therefore the truth can be no ground for the Court to mitigate his punishment.

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Scarlett, Denman, Phillipps, Blackburne, and Evans, contra. These affidavits are admissible. The object of the defendant is not to charge the government with the acts which took place at *Manchester*, but to shew that his address to his constituents was called for by facts which really existed. If the facts were wholly false that might be urged strongly in aggravation of punishment, and if so, the truth of those facts may as fairly be urged in mitigation. In *Starkie on Libel*, p. 561., it is stated, that although the truth of the publication cannot constitute a distinguishing boundary between criminality and absolute innocence, yet it may materially affect the measure of punishment, and 3 *Bacon's Abr.* 495. is an authority to the same effect. They also referred to *Rex v. Horne (a)*, and *The Earl of Leicester v. Walter. (b)*

ABBOTT C. J. I am of opinion that these affidavits cannot properly be laid before the Court. It is perfectly

(a) *Cowp.* 682.(b) 2 *Campb.* 251.

clear

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clear that if we receive those now offered, we must receive affidavits on the other side in contradiction, and then the Court must necessarily be placed in the situation of trying facts relating to the misconduct, real or supposed, of those who constituted a part of his majesty's army, in their absence, and perhaps to their very great injury. It seems to me that the proper course to adopt, in the present stage of the proceeding, is to look at the situation in which the defendant himself was placed at the time he composed and published the libel for which he is now called upon to answer. We should consider ourselves as possessing the same means of knowledge, and no other, of the matters which formed the inducement to the composition itself, which the defendant himself then possessed. He has informed us by his affidavit, that he was induced to write and publish this address to his constituents, in consequence of representations seen in various newspapers, as to something that either had or was supposed to have occurred at *Manchester*. It seems to me that we should do great injustice to the defendant, if we were to allow ourselves to be induced, for the purpose of aggravating punishment, to receive any affidavits of the falsehood of those representations on which he tells us he was moved to write that which he did. I think, as on the one hand we cannot, with justice to the defendant, receive such affidavits, so on the other hand we cannot receive affidavits which go to shew that a great part of the representation contained in those newspapers, which led the defendant to express his feelings thus strongly, was founded in truth. The affidavit made by the defendant himself, stating that his feelings were strongly excited by the statement he had read in the newspapers, was

was most properly laid before us. To that, in forming an estimate of the character of that which was written by the defendant, I shall give its due and proper weight; but I am clearly of opinion that these affidavits now offered cannot be received.

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BAYLEY J. I entertain no doubt that in this case any evidence of the truth of the facts charged in this information is inadmissible. If we were to accede to it, we should let in a most dangerous rule of practice, and one which would be a great disgrace to the administration of justice. The libel in question imports, that the troops had killed men unarmed, unresisting, and had disfigured, maimed, cut down, and trampled on women. If that were done, if unresisting men were cut down, whether by troops or not, it is murder for which the parties are liable to be tried by the law of the country; and I for one will ever uphold this, that a man shall come to his trial fairly, and without any prejudice created upon the public mind in that respect. In *Rex v. Fleet* (a) the publication of depositions taken before a coroner was brought under the consideration of the Court, who thought it a ground for a criminal information. For by putting the public into possession of the facts, before the period at which the party is to be put upon his trial, such a prejudice in the public mind may be created, as to make it impossible when the party is afterwards put upon his trial on that inquest, to select a jury whom that prejudice has not reached. The law of *England* is anxious for the interests of persons against whom charges may be made. If a man commits a crime, there is

(a) 1 B. & A. 372.

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a legal and constitutional mode by which that crime may be brought into discussion. He is liable to be tried, but though his crime may be as great and as aggravated as possible, he ought to have a full, fair, dispassionate, and temperate investigation of his conduct at the time of trial. In this case, the libel imputes that which would be murder, and it charges not any particular individual, but a body at large with the crime. Now it is impossible for a man to read this, even although he may not be able to fix on any of the persons constituting a part of that body, without a degree of irritation being created against them, so that if afterwards they are singled out as the individuals against whom an indictment is preferred, a prejudice, not against them individually, but as having constituted a part of that body, would probably be raised. Then if the Court allow the truth in this case to be laid before them in mitigation of the punishment of a person, who, not in the course of the administration of justice, but as a volunteer, has laid this before the public, they would give to him an opportunity of bringing forward a charge against a body of men; and if any of the individuals of that body afterwards are put upon their trial for the share they have taken in the transaction, it may be difficult, nay, impossible, that they should have an unprejudiced trial. In the observations I have made, I have confined myself to those cases in which the charge is a charge of an indictable offence. There may, by possibility, be cases in which the publication may be a libel or not, according as the fact be true or false; and in such cases, where the falsehood is essential to constitute the crime, or the truth is sufficient to do away the crime, as it seems to me, the truth may possibly be received in evidence.

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I do not therefore mean to say that there may not be some cases in which the truth may be brought forward as an answer to the charge, or as a mitigation of punishment. I will put a very plain and familiar case. Suppose that I publish that on such a day a man was convicted of perjury, and the fact was so. Am I then to be indicted for telling the public that he was so convicted of perjury? I am at liberty to shew that he was indicted for the crime, that he was convicted, and that therefore there was no offence in my making that communication to the public, of an existing fact. That is one instance, and very probably many other instances ejusdem generis might be put. The case of *The King v. Horne* has been mentioned. It is plainly distinguishable from the case before the Court, on the ground that the libel did not impute to any persons there mentioned, that they had been guilty of an indictable offence. It appears to me, upon the whole, that it would be a great obstruction to public justice, and a great stigma on the administration of justice in this country, if, in a collateral way, in a transaction in which the public mind may happen to be interested, any person, by a voluntary publication on his part, should be at liberty to raise the question, whether particular individuals had or had not been guilty of particular crimes, instead of doing so in a constitutional mode, by bringing forward the charges against those individuals openly, and giving them a fair opportunity of defending themselves against the accusation. I think, therefore, that these affidavits cannot be read.

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HOLROYD J. I am also of opinion, that in this case we are bound by law to say, that these affidavits cannot be read. This is a libel which assumes certain facts to

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have been stated in the public papers, and certainly the truth that those newspapers had contained those particulars (whether the account given in those papers was correct or not) may legally and properly be offered to the Court, in considering the motives and grounds for the impression which produced that publication which is charged as a libel. The libel does not assume to proceed on any facts known to the defendant: but only on information which he has received upon the subject; and the affidavits now offered are not to shew what information the defendant received, and upon which he acted in publishing this libel, but certain matters, the existence of which, if true, formed no ground or motive on which he acted in publishing the letter in question. It appears to me, that it would not be proper for the Court to receive affidavits stating that there was no foundation at all for those accounts which were given in the newspapers, and upon which the defendant acted. If, then, that circumstance would not constitute an aggravation of the offence, the contrary ought not to operate in alleviation of it. The falsehood of these accounts does not form any ingredient in the crime for which the defendant is called up for punishment, and therefore it is not to be assumed, that the accounts there stated were false, but only that, not knowing whether they were true or false, upon the reading of those papers, he, with the intent charged in the indictment (which is found by the jury,) published this paper, containing a statement of the facts, or rather an assumption of the facts as represented in the newspapers, and expressing the irritated feelings of his mind upon the subject. The falsehood, in this case, is no ingredient in the crime charged against Sir *P. Burdett*. The charge is, that he has published this upon reading these things in a public

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newspaper. Whether they be true or whether they be false, he has given vent to those feelings, in order that this matter might be published throughout the kingdom, with a view to call a meeting of his electors, and in order that other public meetings might be held throughout the kingdom. That is the charge for which he is brought up to receive the judgment of the Court; in which, as it appears to me, falsehood is no ingredient; we are not to assume that the statements are false, and therefore we are not to receive affidavits to shew that they are true, particularly if they go to affect other persons; bodies of men, the particular individuals of whom are not named. It might be necessary perhaps for all those individuals to come with affidavits before it could be said that the charges made by these affidavits were fully answered. The effect on the minds of the public would be most injurious, if, previously to the bringing of persons to trial who have committed offences as charged by this libel, such a publication as this could be permitted. The law of *England* says, that libels are not to be published respecting persons accused, but they are to come fairly to their trial. It appears to me, that we are by law bound to say, that we cannot receive these affidavits in mitigation of punishment.

BEST J. I am of the same opinion. This libel imputes the commission of a crime to certain persons composing part of the king's troops, who are stated to have killed or maimed certain subjects of the king. That crime may be either murder or manslaughter, according to circumstances; and if we were to receive affidavits to shew that the facts alluded to in this libel were true, we must receive also counter-affidavits on the other side; and we should then try upon affidavit, in

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the absence of the parties to whom the crime is imputed, the question of their criminality. A distinction has been taken between giving the truth in evidence at the trial, and giving it in evidence in mitigation of punishment. In my opinion, it is less objectionable that it should be received in evidence at the trial, than in this stage of the proceeding; because the matter must now be tried upon affidavit, and every lawyer knows how difficult it is to get at the truth of such matters upon affidavits. The present case is very distinguishable from *The King v. Draper*, to which I have called the attention of the Court. The libel of the defendant, there, consisted in a statement of facts within his own knowledge; but that which induced the defendant to publish this libel, was the statement of facts which he read in the newspapers. The truth or falsehood of these facts is not the subject of enquiry here, but the spirit which actuated the defendant at the time of the publication. To judge of that, we must consider his situation at that time, and the means of knowledge which he then possessed. That was wholly derived from the statement he had read in the newspapers; and therefore, in this case, his criminality in publishing the libel in question is neither increased nor diminished by the truth or falsehood of the facts stated to have occurred at *Manchester*. For these reasons, I am of opinion that these affidavits cannot properly be laid before the Court.

*Thursday,
February 8th.*

The defendant now put in an affidavit, stating that all the different accounts he read in the newspapers, and received elsewhere, of the meeting at *Manchester*, however they varied respecting the motives and objects of the persons assembled there, did all concur in stating the

the fact that no violence, nor any disorderly conduct, had been committed by the people, and that no attempt had been made on the part of the civil power, either to apprehend the speakers or to disperse the crowd; but that an armed body of yeomanry, without any previous notice, rode in amongst an unresisting multitude, and committed the acts stated in the newspapers: and that he, the defendant, had no doubt in his own mind that the statement was true.

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The Court sentenced him to pay to the king a fine of 2000*l.*, and to be imprisoned three calendar months.

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THE defendant was indicted for the publication of a blasphemous libel. At the trial, at the *London* sittings after *Trinity* term, before *Best* J., the defendant conducted his own defence, which he read from a written paper. In the course of this, he made several offensive observations concerning the Christian religion, and derogatory to the character of persons who were not present in Court to defend themselves. The learned Judge warned him of the impropriety of such conduct, and told him he would not allow him to revile the Christian religion, or attack the character of persons not before the Court. After this admonition, the defendant, as a reason for his not employing counsel, used this expression: "No barrister will undertake and uphold an honest defence in a cause like mine." The learned Judge again interposed, and told him that his conduct was highly improper, and that

A judge at nisi prius has the power of fining a defendant for a contempt committed by him in the course of addressing the jury.

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he must confine himself, strictly, to matter relevant to his defence, and that, if he departed from that course, he, the learned Judge, should be obliged to use the means he had, to restrain him; to which the defendant replied, "My lord, if you have your dungeon ready, I will give you the key." For that expression the learned Judge fined him 20*l*. The defendant afterwards used the following expressions. "The Deist is anathematized, because he cannot believe that some traditions, handed down among the Jews and the Christians, are a Divine revelation, and not only superior to the several and respective revelations possessed by the Turks, the Brahmins, or the Hindoos, and many others, but the only genuine and authentic revelation in existence. Now it so happens, that the Deist considers this collection of ancient tracts to contain sentiments, stories, and representations, totally derogatory to the honour of a God, destructive to pure principles of morality, and opposed to the best interests of society." For these expressions the learned Judge fined him 40*l*. The defendant, after that, said, "The bishops are generally sceptics;" for which the learned Judge fined him 40*l*. The defendant having been convicted, *Cooper*, in *Michaelmas* term, obtained a rule nisi for a new trial, upon an affidavit, which stated, that, by these fines, the defendant was intimidated and confounded, and omitted some most material parts of his defence, among which were a hundred respectable authorities, selected from the writings of ecclesiastics as well as laymen, in favour of a free toleration, and against every species of persecution, on the score of opinion, which deponent had connected by a chain of reasoning and appropriate remarks; and it further stated his belief, that, had he been permitted to go on without those interruptions

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and fines, which paralyzed his energies, he should have succeeded in making an impression on the jury in his favour, and obtained a verdict of acquittal.

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Gurney and *Marriott*, in *Michaelmas* term, shewed cause. These fines were properly imposed; the first was for an expression that contained a direct insult to the judge, and therefore, of itself, was a contempt of Court. The second fine was for a repetition of the offence for which he was indicted. That was a contempt, therefore, inasmuch as it was a breach of the law committed in the face of the Court; and also was a direct contravention of the order of the learned judge. The last fine was for an attack upon the character of persons not before the Court, and was a contempt, as it was in contravention of the order given by the learned judge. These fines, therefore, were all properly imposed, and the necessity for imposing them was created by the misconduct of the defendant himself. He cannot, therefore, make the impositions of those fines a ground for a new trial.

Cooper contra. A judge has no power to fine a defendant for impropriety in the course of his speech to a jury in his defence. In *Viner's Abridgment*, more than eighty instances of contempt are given, but there is none of a fine on a defendant for a contempt committed in his defence. Lord *Coke*, in his 2nd Institute, 228., commenting upon the statute of *Westminster*, says, that it extends only to extra-judicial slanders; and, therefore, if any man bring an appeal of robbery, murder, or other felony, against any of the peers or nobles of the realm, and charge them with murder, robbery, or felony, albeit the charge be false, yet shall they have no action

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de scandalis magnatum, neither at the common law, nor upon either of the statutes for the bringing of his action, nor for affirming the same to his counsel, or attorney, or cursitor, for the framing of his writs, or *for speaking the same in evidence to a jury*. And the reason given is, “that men should not be deterred to take their remedy by due course of law.” Now, if a man is not to be deterred by the fear of an indictment for libel, or an action for scandal, from prosecuting public offences, or the assertion of his civil rights, much more ought a defendant, in a case like this, to be free from all risk and fear. If men are to be free from all intimidation that may make them hesitate to promote public justice, by prosecuting others, surely they are to be equally unrestrained by any fear of consequences from what they may say in defence of themselves. This has always been received and acted upon as law, and that too even by the Star Chamber. The case of *Bastwick, Burton, and Prynne* (a), is an authority to shew that a party cannot be prosecuted or sued for any thing alleged by him as a party in a cause. Now where an indictment will not lie, a judge cannot fine for contempt. As a defendant cannot be indicted for scandalous matter on third persons spoken in his own defence, it follows that he cannot be fined. For if a judge could fine him, and so punish him summarily, the higher mode of punishment would be possessed, when the lower was wanted, which would be an absurdity. No such power ever was exercised by a judge till the present instance, and the non-exercise of it is sufficient to shew that it is against law. On the other hand, there are instances where defendants have used the most contemptuous expressions in the course of their defence, and yet no fine has been imposed; Sir *Walter Raleigh's*

(a) 3 *Howell's State Trials*, 714.

case, 2 *Howell's State Trials*, p. 15. Colonel *Lilburne's* case, 4 *Howell's State Trials*, 1291, are in point. In the case of *Bastwick, Burton, and Prynne*, 3 *Howell's State Trials*, 722., *Bastwick* reproached the bar for want of independence in addressing the Court, imputed impiety to the bishops, and directly attacked the Court itself. The conduct of Lord *Ellenborough C. J.* in *The King v. Eaton*, and that of *Abbott C. J.* in *Rex v. Carlisle*, are strong negative authorities to shew that no such power exists.

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ABBOTT C. J. If I thought that the decision I am about to pronounce, could have the effect of restraining any person who may hereafter stand on his trial, from making a bold, as well as a legitimate course of defence, I would pause before I pronounced that decision. The question, indeed, is a momentous one. It is absolutely a question, whether the law of the land shall, or shall not continue to be properly administered. For it is utterly impossible that the law can be so administered, if those who are charged with the duty of administering it, have not power to prevent instances of indecorum from occurring in their own presence. That power has been vested in the judges, not for their personal protection, but for that of the public. And a judge will depart from his bounden duty, if he forbears to use it when occasions arise which call for its exercise. I quite agree that this power, more, especially where it is to be exercised on the person of a defendant, is to be used with the greatest care and moderation. But if the publication of blasphemy and irreligion can not in any other way be prevented, in my opinion, a judge will betray his trust who does not put it in force. An allusion has been made to my own personal conduct

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conduct on a former occasion. I have often doubted, whether I did not in that case permit too much to be done; but I thought then, that it was better to err on the side of forbearance. The question here is, if a judge, sitting at nisi prius, has power to impose a fine on a defendant for a contempt? That he has power to do so, I can entertain no doubt; no lawyer can doubt the power of every court to fine for contempt. As to the particular occasion on which these fines were imposed, I disclaim any right to judge of it; but I should be wanting to myself and my feelings, as well as my duty to others, if I did not say, that, in the view that I have taken of this case, it is most manifest that the defendant came into court with an express design to revile the Christian religion. It became the duty of the judge to prevent him from so doing, by the imposition of a fine, when he found that remonstrance had not that effect. Can we collect from any thing now before us, that the effect of that was to stop the defendant in any legitimate course of defence whatever, or to deprive him of the means of urging any topic to the jury which could have led them to pronounce a verdict other than they did? The publication of the papers was proved beyond doubt, and their meaning is not made the subject of any question. The object the defendant seemed to have in view, was to re-assert the substance of the sentiments contained in those papers, and to maintain that he had a right to do so. Is a judge to sit and hear a man maintain his right to assert or publish blasphemy? Can the law be administered, if the affirmative of that proposition be for a moment admitted? I am quite confident that it cannot. But what is it that this defendant has been restrained from doing?

doing? Looking at his own affidavit, he says, that his paper contained a great deal more, that some part of it, in his judgment and belief, was fit and proper to be submitted to the consideration of the jury, because it contained the sentiments and opinions of many learned persons as to the impropriety of prosecution for religious opinions. But how was that in any degree relevant to the point in question? Upon the whole, I think that the law cannot be properly administered, unless this power of fining exists, and that the exercise of it, on the present occasion, was called for by the conduct of the defendant; and, being perfectly satisfied that the effect of it was not to deprive the defendant of any thing that might have served him in his address to the jury, I am clearly of opinion, that we ought not to grant a new trial.

BAYLEY J. I entirely agree with my Lord Chief Justice, that in this case there ought not to be a new trial. The question is shortly this, whether, for the future, decency and decorum shall or shall not be preserved in courts of justice; or whether, under colour of defending himself against any particular charge, a defendant is at liberty to introduce new, mischievous, and irrelevant matter upon his trial. I agree that a defendant, in all cases, should have every facility allowed him in his address to the jury, provided he confines himself within those rules which decency and decorum require. In every case, the subject of discussion before the jury is to be considered, and a judge is bound to see that the arguments which are adduced, are such as are consistent with decency and decorum, and not foreign to the matter on which the jury have to decide. When a case is conducted by counsel, they know perfectly

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perfectly well what the rules of law are, and they have that regard for their own character which generally prevents them from doing any thing which may break in upon the rules of decency and decorum. They have also sufficient knowledge (arising from their experience and education,) to form a judgment whether the matter be relevant or not. But defendants are not in the same situation in which counsel are; they have not the same character to maintain, and are not always so well informed as to know what is relevant or irrelevant. But every man who comes into a court of justice, either as a defendant or otherwise, must know that decency is to be observed there, that respect is to be paid to the judge, and that, in endeavouring to defend himself from any particular charge, he must not commit a new offence. Of the power of a judge to fine for a contempt of court, I have not the least doubt, and I am of opinion also, that the judge alone is competent to determine whether what is done, be or be not a contempt; and that neither this court, nor any other co-ordinate court, has a right to examine the question, whether his discretion, in that respect, was fitly and properly exercised. If, indeed, the judge were to use his power corruptly, he would be liable to an impeachment. If, in this instance, I were at liberty to express an opinion on the propriety of the fines in question, I should certainly say, that I see no reason whatever to be dissatisfied with the exercise of that discretion. I think the conduct of the defendant called for the interposition of the judge; and that he would have abandoned his duty to the public, if he had not interposed. The question for us to consider is, whether the actual exercise of that power did, in this particular instance, produce such an effect on the defendant as to give him a fair and reasonable ground

ground for making an application to the discretion of this court, in order to have a new trial. Now, in considering that, we must of necessity look to the conduct of the defendant himself at the time when he was fined; for if we find, as in the present case, that his conduct was improper, then we cannot interfere in his behalf, for it is his own fault, if he has been deprived of the means of laying before the jury that which might have been a legitimate ground of defence. We must also consider whether it is probable that he has been precluded from urging that which might have operated upon the minds of the jury, so as to induce them to come to a different conclusion, because, unless that was so, it furnishes no ground for a new trial. Now it is not suggested to us, that it is probable that the defendant was precluded from insisting on any thing which might have had a favourable effect on the minds of the jury. When I look at the libel in question, and the evidence of the publication of the two papers, it seems to me to be utterly impossible to suppose, that any thing could have induced the jury to come to a different conclusion from that at which in this case they did arrive. And thinking as I do upon that point, it seems to me, that it would be a perfect abandonment of our duty, if, in this case, we were to accede to the present application.

HOLROYD J. I am also clearly of opinion that we should not be justified in granting a new trial. All the cases on this subject, with respect to the power of courts of record to fine and imprison for contempt, are collected together very ably by Mr. Justice *Wilmot*, with a view to a judicial opinion, in the *King v. Almon* (a).

(a) *Wilmot's Notes*, 243.

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As far as I can in this case enter into the consideration of the subject, as to the propriety of the fines in question, I think the judge was fully justified in imposing them, and not only fully justified, but was called on in the discharge of his duty to impose them, in order to prevent the line of defence in which it manifestly appears the defendant was determined to proceed, even after a warning had been given to him to desist. The judge had the defence of the law entrusted to him, and he must either have permitted a breach of it, in which case I think he would have abandoned his duty, or he must have fined or imprisoned the party. If he had imprisoned the party as for a contempt, that might have had a worse effect on the defendant, and the only course, therefore, which he could take, was that of fining. After the first fine was imposed, one should have supposed that it would have prevented a repetition of the offence; but it seems as if there was a direct design to set at defiance the law, for the defendant said that he would persist in that course of defence. Now, what is that line of defence? The defendant is called upon to answer for a crime for publishing a blasphemous libel. In such a case, instead of defending himself by shewing that he is not guilty, or has done it under such circumstances as will justify his act, he chooses to justify the thing itself, and says that he will persist in the blasphemy. That is an offence at law committed in the face of the court. Then is the judge, whose sworn duty it is to punish crime when established by proof, and brought before him judicially, to sit and hear the law defied, and suffer a crime, a repetition of the same crime, to be committed in his presence? The law arms him with an authority to fine and imprison a person for so doing, and makes it incumbent on the judge

judge so to act. In the case of an insult to himself, it is not on his own account that he commits, for that is a consideration which should never enter his mind. But, though he may despise the insult, it is a duty which he owes to the station to which he belongs, not to suffer those things to pass which will make him despicable in the eyes of others. It is his duty to support the dignity of his station, and uphold the law, so that, in his presence at least, it shall not be infringed. I think the judge in this case was justified in stopping the defendant in this line of his defence, and was justified in fining him for persisting in it. I mention these things, because it is said, that, supposing the judge had the power, he may have improperly used it, and that if that was the case, it might be a ground for letting the defendant have a new trial, and that by the imposition of the fines, the defendant became embarrassed, and had not such advantages of making his defence as he otherwise might have had. But in this case, if any embarrassment arose, it was owing to his own pertinacity, and his determination to go on against the law. I can see no ground for granting a new trial. He does not now state in his affidavit any legal defence which he was prevented from making, nor lay any thing before us which can induce any reasonable person to consider that the verdict could have been otherwise. It would at all events be necessary for him to shew, that he had some grounds of defence which might have induced the jury to come to a conclusion in his favour. He has not done that by his affidavit. Agreeing, as I do, with the rest of the court, upon the power to fine, I am of opinion that we ought not to grant a new trial in this case.

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The King
against
Darnley.

BEST J

1821.

The King
against
DAVISON.

BEST J. No man who pretends to any knowledge of the law can doubt, that a judge of a court of record has authority to fine or imprison for any contempt, committed in the face of the Court. From the earliest period of our history, this authority has been exercised. The year-books record instances of such commitments, and there are similar instances in other books of reports. At those times when our ancestors have abolished or restrained improper authorities, they have not touched this, because they found it essential to the due administration of justice. A court of nisi prius is a court of record, and the judge presiding in it is therefore invested with the power of committing for contempt. If, however, it is made to appear to the Court, from which the record was sent, that, by the improper imposition of such fines, a defendant who defended himself, has been prevented from making a full and fair defence, that court ought to grant a new trial, although, strictly speaking, punishments for contempt cannot be inquired of in any other court than that by which they were imposed. For the same superintending authority which gives the Court in bank a power of preventing injustice from any error of the judge at nisi prius, must enable the Court to inquire, whether the improper infliction of a fine has restrained a defendant from offering either evidence or observations to a jury proper to be submitted to them. But if the fine be proper, a defendant cannot be allowed to complain of the effect that the imposition of it has occasioned to him. This would enable a party to take advantage of his own delinquency. I conceive that I had authority to fine the defendant for any insult offered to me, or for transgressing any proper rule laid down by me for the decent and orderly conduct of the cause. I was satisfied that
this

this defendant, from his manner, and the language he used in the beginning of his defence, was desirous that I should commit him. I told him that, besides the power of committing, I had that of fining, and that I should exercise this power, if he offered me any insult; if he attacked the truths of Christianity, or calumniated parties not before the court. For the grossest violations of this order, which I have already stated to the Court, I fined him three times. He submitted himself to my authority, and I ordered the fines to be taken off. Whatever it might have been fit to do in the case of *The King v. Carlile*, I think I could not, with propriety, have acted otherwise than I did on this occasion. It has, since *Carlile* was tried, been seen, that persons indicted for libels, who defend themselves, think that they may insult the judge, calumniate all who are in authority in the country, and utter blasphemy more horrible than that for which that defendant was convicted. I am therefore clearly of opinion, that there is no ground for this application for a new trial, and that this rule ought to be discharged.

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against
DANIEL.

Rule discharged.

JOHN ROBINSON FRANKLIN, DANIEL BRENT,
WILLIAM SIMS, JAMES SIMS, and JACOB
SIMS, - - - - - Plaintiffs;

AND

JOHN HOSIER and Others, Assignees of the
Estate and Effects of WILLIAM MASSON, a
Bankrupt, - - - Defendants.

SAMUEL Brent, the elder, Daniel Brent, John Brent,
and Samuel Brent, the younger, in the year 1812,
carried on the business of shipwrights, in co-partner-

A ship-wright
has a lien upon
a ship for re-
pairs.

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ship together, at *Rotherhithe*, in the county of *Surrey*. In the month of *July*, 1812, a ship called *The Northumberland*, whereof the said *John Robinson Franklin*, *Daniel Brent*, *William Sims*, *Jacob Sims*, *William Masson*, and *James Masson*, were owners, and the said *William Masson* was managing owner, returned to the port of *London* from the *East Indies*, and requiring considerable repairs; she was, after discharging her cargo, put or sent by the said *William Masson*, as such managing owner, into the dock-yard of the said *Samuel Brent* and Co., for the purpose of being thoroughly repaired, and they, by the direction of the said *William Masson*, duly repaired the said ship. *William Masson*, shortly prior to such repairs being completed, stopped payment, and on the 19th of *January*, 1803, a commission of bankrupt issued against him, under which he was declared a bankrupt, and at the time of his failure and bankruptcy, the *Northumberland* was in the actual possession of *Samuel Brent* and Co., in their dock, for the purpose aforesaid, and they refused to part with the possession of the ship, alleging that they had a right to detain her until the amount of the repairs should be paid.

The question directed by the Lord Chancellor for the opinion of the Court was, whether *Daniel Brent*, *John Brent*, and *Samuel Brent*, the younger, and their late deceased partner, *Samuel Brent*, the elder, as shipwrights, having the said ship *Northumberland* in their actual possession, in their dock, at the time of the bankruptcy of *William Masson*, the managing owner of the said ship, had a lien on the said ship for the repairs of the said ship. The case was argued in last *Michaelmas* term, by

Campbell, in support of the lien. It may be laid down as a general rule, that every artificer has a particular

lien on a chattel which has been delivered to him in his business, and on which he has expended his labour. The law inclines against general liens, but considers particular liens as founded in justice and favourable to trade. Accordingly they have not been confined to cases in which an obligation is created by law to do the act from which the debt to be secured arises, as in the case of carriers and innkeepers, but they have been established in every trade in which they have been questioned. In all the cases in which the existence of a general lien in any particular trade has been debated, the existence of a particular lien has been admitted. *Ex parte Deeze* (a). In *Ex parte Shank* (b), Lord Hardwicke assumes that a ship-carpenter has such a lien while the ship remains in his possession. In *Raitt v. Mitchell* (c), Lord Ellenborough held, that a ship carpenter has no lien where the repairs are done to the ship on credit, which is inconsistent with lien; but here the money for the repairs is alleged to have been due, while the ship remained in the possession of the carpenters. The last case on the subject is *Ex parte Bland* (d), and there Lord Eldon says, "The principle which regulates the present application, I find accurately laid down by Mr. Abbott (e): where the repairs are executed in a port in this country, the vessel, till parted with, is specifically chargeable with their amount, but the lien is lost with the possession."

Littledale, contra. The chancellor must at least have entertained doubts upon the subject, by sending the case here. A distinction may be taken between ships and other

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 ———
 FRANKLIN
 against
 HOBBS.

(a) 1 Atk. 228.

(b) 1 Atk. 234.

(c) 4 Campb. 146.

(d) 2 Rose, 91.

(e) Abbott on Shipping, 134.

chattels;

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against
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chattels; for ships generally bear an infinitely greater proportion to the repairs done upon them, than other chattels delivered into the possession of an artificer; and it is a matter of public importance, that they should be employed in navigation, rather than rot in a carpenter's dock. Here an additional difficulty arises from one of the ship carpenters being likewise a part owner of the ship; and it is impossible, under these circumstances, to say, that he has a legal lien against himself.

Cur. adv. vult.

The following certificate was afterwards sent to the Lord Chancellor.

This case has been argued before us by counsel, and we are of opinion that *Daniel Brent, John Brent, Samuel Brent* the younger, and the deceased *Samuel Brent*, as shipwrights, having the said ship the *Northumberland* in their actual possession in their dock at the time of the bankruptcy of *William Masson*, had a lien on the whole ship or vessel called the *Northumberland*.

C. ABBOTT.

J. BAYLEY.

G. S. HOLROYD.

W. D. BEST.

END OF HILARY TERM.

C A S E S

ARGUED AND DETERMINED

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IN THE

Court of KING's BENCH,

IN

Easter Term,

In the Second Year of the Reign of GEORGE IV.

PAGE, Assignee of EHRENSTROM, a Bankrupt,
against BAUER. (a)

ASSUMPSIT upon promises to the bankrupt before his bankruptcy, and also to the assignee after the bankruptcy. The plaintiff was the provisional assignee of a bankrupt, defendant pleaded the general issue: Held, that the fact of the bankrupt's estate having been assigned by the provisional assignee to the new assignees, between the time of issuing the writ and the delivery of the declaration, is no ground of nonsuit upon a plea of non assumpsit. *Quære*, Whether it would have been an answer to the action, if specially pleaded?

(a) By the 1 & 2 G. 4. c. 16. it is enacted, " That it shall and may be lawful to and for the Judges of this Court, or any three or more of them, and they are required, unless prevented by illness, public business, or other reasonable cause, to meet at *Serjeants' Inn Hall*, or at some convenient place in *Westminster*, according to their discretion, on the *Tuesday*

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sional assignee appointed under the 5 Geo. 2. c. 30. s. 30. The latitat was sued out during the time that he continued assignee; but before the declaration was delivered, the new assignees were appointed, and all the bankrupt's property duly assigned to them. This action was continued by them for the benefit of the creditors. The cause was tried before *Best J.*, at the *London* sittings before last *Michaelmas* term; and it was contended, that as the property of the bankrupt had passed from the plaintiff before the declaration, he had no cause of action whatever. *Best J.* was of opinion that that was no matter of defence upon the general issue, and he directed the jury to find a verdict for the plaintiff, with liberty for the defendant to move to enter a nonsuit; and a rule nisi having been obtained for that purpose in last *Michaelmas* term,

Gurney and *Barnewall* now shewed cause. The fact of the bankrupt's estate having passed to new assignees,

fortnight, or some subsequent day before *Easter* term then next ensuing, and also on the 20th day of *October* and the 10th day of *January* for ever hereafter, unless either of the said last-mentioned days shall be a *Sunday*, and then on the following day; and also on some day, to be by them appointed, before every other *Easter* term, if the time of the circuits shall so permit, and to sit on the several days hereinbefore appointed, and so on from day to day (*Sundays* excepted) until the commencement of the term next following, for the despatch of all such matters as now are, or, at the end of any term preceding the said respective days, hereafter may be depending in the said Court, whether on the crown or plea side thereof, and to hear, decide, and pronounce rules, orders, and judgments upon all such matters; which rules, orders, and judgments shall be drawn up and entered of record, either as of the term last past before the pronouncing thereof, or as of the term then next ensuing, as the said Judges shall direct; which said meetings of the said Judges shall be called *The Sittings before Term.*"

The Judges of this Court sat at the Sessions' House, *Westminster*, from *Wednesday, April 25th*, until the term. *Holroyd J.* was absent during the first six days, in consequence of the severe indisposition of his son.

after

after the suing out of the writ, and before the declaration, would not, even if specially pleaded, furnish an answer to this action. If it would, the object of the appointment of a provisional assignee under the 5 Geo. 2. c. 30. would be defeated; for by s. 30. the commissioners are authorised, "for the better preserving and securing the bankrupt's estate," immediately to appoint a provisional assignee. Such appointment, however, would not tend to the better securing of the bankrupt's estate, if actions commenced by such assignee were necessarily to be defeated by the appointment of the new assignees. An action commenced for the very purpose of saving the statute of limitations might thus be defeated. The debt for which such action might be commenced cannot be excepted out of the property assigned to the new assignees; for the provisional assignee is bound by the words of the statute to assign to the new assignees *all* the estate and effects of the bankrupt. *Hewit v. Mantell* (a), and *Waugh v. Austen* (b), are authorities to shew that the bankruptcy of the plaintiff, after the commencement of the action, does not abate the suit; yet, in that case, the property is wholly divested out of the bankrupt from the time of the act of bankruptcy. Admitting, however, that this would be an answer to the action, if specially pleaded, it is clear that the defendant cannot avail himself of it upon the plea of the general issue. It is a settled rule in pleading, that matter of defence arising after action brought cannot be pleaded in bar of the action generally, *Le Brett v. Papillon*. (c) In *Morgan v. Painter* (d), the plaintiff

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(a) 2 Wils. 372.

(b) 3 T. R. 437.

(c) 4 East, 507.

(d) 6 T. R. 265.

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took husband after suing out the writ, and before the declaration; and it was held that the defendant could not give the coverture in evidence under the general issue, but must plead it in abatement. Here, the property of the bankrupt was vested in the plaintiff at the time of suing out the writ; and *Wood v. Newton* (a), *Johnson v. Smith* (b), *Bridges v. Knapton* (c), and *Hardymann v. Whitaker* (d), are authorities to shew that the issuing of the writ may be considered as the commencement of the suit.

Marryat and *F. Pollock*, contra. The fact of the bankrupt's estate having passed to the new assignees before the delivery of the declaration would undoubtedly have been an answer to this action, if specially pleaded. *Kinnear v. Tarrant* (e) is an authority to shew, that in scire facias against bail it is competent to the defendant to plead in bar against the issuing of execution, that before the issuing of the writ of alias scire facias the plaintiff became bankrupt, and a commission issued against him, on which he was declared a bankrupt before the return of the writ, and his effects, debts, &c. assigned to the provisional assignee, who, before plea pleaded, assigned to the assignee under the commission, who was entitled to sue the defendants, &c. The ground of that decision was, that the plaintiff had no property in the subject matter, in respect of which the action was brought. It is an authority therefore expressly in point, to shew that this action could not

(a) 1 *Wils.* 141.(b) 2 *Burr.* 950.(c) 2 *Burr.* 965.(d) 2 *East*, 574.(e) 15 *East*, 622.

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supported, if the defendant had pleaded specially that the estate of the bankrupt had passed out of the plaintiff before declaration. Secondly, the defendant may avail himself of this matter of defence upon the general issue; for the 5 Geo. 2. c. 30. s. 30. enacts, "That all the estate and effects of the bankrupt, which shall be delivered up or assigned by the provisional assignee, shall be, to all intents and purposes, as effectually and legally vested in the new assignees as if the first assignment had been made to them by the commissioners." Now, if the assignment had been made in the first instance to the new assignees, the plaintiff would not have had any cause of action. This is distinguishable from *Morgan v. Painter* (a), for there the matter insisted on was only the subject of a plea in abatement, where the defendant gives the plaintiff a better writ; but the matter of defence insisted on here shews that the plaintiff had no right of action at all. The declaration, too, may be considered as the commencement of the action; for a plaintiff may include in his declaration any debt accruing after the suing out of the writ, and before the term of which the declaration is entitled. The writ is only considered as process to bring the defendant into court.

ABBOTT C. J. The rule is, that the plaintiff shall recover where the general issue is only pleaded, if it appear that he had a cause of action at the time of the issuing of the writ. There is no special plea upon this record. Unless, therefore, the act of parliament which has been referred to, makes this case an exception to the general rule, the plaintiff is entitled to recover. By the

(a) 6 T. R. 265.

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§ Geo. 2. c. 30. s. 30., “all the estate and effects of the bankrupt, which shall be delivered up or assigned, shall be, to all intents and purposes, as effectually and legally vested in such new assignee, or assignees, as if the first assignment had been made to him or them by the commissioners.” It has been argued, that this clause has the effect of entirely annihilating the interest which the provisional assignee had at the time of issuing his writ. In construing this clause, we ought, however, to consider the object of the statute, which was to enable the assignee to obtain the possession of all the bankrupt’s property, in order to distribute it among the creditors. If we were to hold, that the effect of the assignment to the new assignees is to defeat an action commenced by the provisional assignee, we should thereby in part defeat the object of the legislature; for a party against whom an action is so commenced might thus be enabled, before the appointment of the new assignees, to remove himself out of the reach of the process of the Court. It is unnecessary, however, to say what the effect of such a defence would be, if specially pleaded. It is sufficient to say, that under this plea the defendant cannot avail himself of this defence.

BAYLEY J. There is a privity between the provisional assignee and the assignees who are afterwards appointed, in the same manner as there is a privity between one assignee, who is afterwards removed, and the person who is substituted in his place. (a) In this case, it is material to consider the situation in which the plaintiff stood at the time when the action was commenced. Now a

(a) *De Cossou v. Vaughan*, 10 East, 61.

plaintiff

plaintiff is at liberty to consider the suing out of the writ as the commencement of the action. It is true, that in some cases he is entitled so to consider the time when the declaration is delivered; but there is no case in which he is compelled to consider the declaration as the commencement of the action, in opposition to the period of time when the writ was sued out. Here then the plaintiff had a cause of action vested in him as assignee of the bankrupt, at the time when the action was commenced. A circumstance afterwards occurs between the issuing of the writ and the declaration, which would have taken from the plaintiff the right of suing at all, if it had happened at an antecedent period. It seems to me, however, that that having taken place at a subsequent time is no answer to this action upon the plea of the general issue. The defendant does not, indeed, deny that the assignee of the particular bankrupt has a cause of action; but the defence is, that the plaintiff is no longer his assignee; and, therefore, by a circumstance which has occurred in the course of the suit, there is a disability in him to sue. That fact, however, as it appears to me, ought to have been specially pleaded, and cannot be given in evidence under the general issue. I cannot distinguish this from the case of a plaintiff who has commenced a suit, and afterwards becomes bankrupt: his assignee is entitled to continue the suit, in the name of the bankrupt; yet, in that case, all his rights are vested in the assignee from the time of the act of bankruptcy. Unless, however, those facts are specially pleaded, the assignees are entitled to continue the suit in the name of the bankrupt. It seems to me, therefore, upon the same principle, that in this case the right of action having been once vested in the first assignee, the

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other assignees are at liberty to go on with the suit, unless the defendant, by a special plea, insist that the suit should be carried on in the name of another. I think, therefore, that this rule should be discharged.

BEST J. 'At the time of the trial, I was much struck with the inconvenience that would frequently arise, if a provisional assignee might not maintain and continue an action. It is useful to appoint a provisional assignee, either to protect the property against an extent, or to sue a debtor about to remove himself out of the process of the Court. I therefore entertain great doubt whether the fact of the property of the bankrupt having been transferred to other assignees, subsequent to the commencement of the suit, would be a subject matter of defence, if specially pleaded. I am quite clear, however, that upon this plea of the general issue it is no defence; and, therefore, I think that this rule ought to be discharged.

Rule discharged.

WEBSTER and Another *against* SEEKAMP and Others.

A ship-owner is liable for necessary repairs done to a ship by the master's order; and the word "necessary" means

such as are fit and proper for the vessel upon her voyage, and such as a prudent owner himself, if present, would order.

ASSUMPSIT by plaintiffs, brass-founders at *Liverpool*, to recover the amount of their bill for coppering a ship, of which the defendants, who resided at *Ipswich*, were owners. In *September*, 1819, the vessel

was at *Liverpool*, bound on a voyage to *Newfoundland* and the *Mediterranean*. The captain of the ship ordered the plaintiffs to copper her; and it was proved that, although it was extremely useful to copper vessels bound to the *Mediterranean*, it was not absolutely necessary, for many vessels went to the *Mediterranean* without being coppered. At the trial, before *Best J.*, at the *London* sittings before *Michaelmas* term, it was contended that the owner of a ship was liable only for contracts made by the captain in respect of stores or repairs that were *absolutely* necessary; and, therefore, that the defendants in this case were not liable. The learned Judge left it to the jury to say whether the coppering was useful and proper for a vessel about to proceed on a voyage to *Newfoundland* and the *Mediterranean*, and whether it were such as a prudent owner himself, if present, would have ordered. The jury found that it was, and the plaintiff obtained a verdict. A rule nisi for a new trial having been obtained, in *Michaelmas* term,

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Gurney and *Littledale* now shewed cause. The owners are liable for any necessary supplies furnished, or repairs done by the master's order. (a) The term *necessary* means what is reasonably fit and proper for the occasion. So, also, an infant is liable for necessities, which means such things as are suitable to his degree, estate, and condition; for that is the language of the replication to a plea of infancy.

Princep, contra. The question left to the jury was, whether the supplies furnished were such as a prudent

(a) *Abbott on Shipping*, 4th edit. p. 127.

owner,

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owner, if present, would have ordered. The true question, however, was, whether they were absolutely necessary; and *Carey v. White* (a) is an authority to shew that the liability of the owner depends upon that fact.

ABBOTT C. J. The general rule is, that the master may bind his owners for necessary repairs done, or supplies provided for the ship. It was contended at the trial that this liability of the owners was confined to what was absolutely necessary. I think that rule too narrow, for it would be extremely difficult to decide, and often impossible, in many cases, what is *absolutely* necessary. If, however, the jury are to enquire only what is necessary, there is no better rule to ascertain that, than by considering what a prudent man, if present, would do under circumstances in which the agent, in his absence, is called upon to act. I am of opinion, that whatever is fit and proper for the service on which a vessel is engaged, whatever the owner of that vessel, as a prudent man, would have ordered, if present at the time, comes within the meaning of the term "necessary," as applied to those repairs done or things provided for the ship by order of the master, for which the owners are liable. I think, therefore, that the question in this case was properly left to the jury, and that this rule ought to be discharged.

BAYLEY J. The captain of a ship, as agent for the owners, has a general authority to act for them. They ought not to appoint a man upon whose compliance with their orders, and on whose prudence and dis-

(a) 5 *Brown's Parl. Ca.* 325. *Abbott on Shipping*, 4th edit. 129.

cretion they cannot rely. The owners are responsible for any thing ordered by him for the ship within the scope of his general authority. Now, I think, it is within the scope of his authority to order such repairs or supplies as it may reasonably be supposed that the owners, if they had had an opportunity of deciding for themselves, would have ordered; and I, therefore, think that this rule should be discharged.

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BEST J. I thought, at the time of the trial, and continue to think, that the rule then contended for was much too narrow. It is a rule which can never be enforced, and cannot, therefore, be a safe rule to be acted upon in cases of this sort. No man can say what is *absolutely* necessary. If the topmasts were lost, a vessel might sail without them, and possibly perform her voyage with safety. A topmast might, therefore, be said not to be absolutely necessary. Yet no prudent man would proceed to sea without it. If, therefore, that rule is not the proper one, I know no other than that which was left to the jury in this case, viz. what repairs were proper or necessary. The mode of ascertaining that is to ask what a prudent owner himself would do if present. The case of *Carey v. White* is very distinguishable from the present; for there, money was supplied to the captain, and he had the opportunity of applying it to any purpose which he thought proper, which is a very different case from that of necessary repairs done to a ship. I am, therefore, of opinion that this rule ought to be discharged.

Rule discharged.

CASES IN EASTER TERM

1821.

DAVIE *against* MITFORD and Others.

ACTION for false imprisonment. Plea, not guilty. The plaintiff was duly declared a bankrupt under a commission issued against him in September, 1818.

A bankrupt, on the day appointed for his last examination before the commissioners, promises to produce a balance sheet, if further time be given. Several adjournments take place, during a period of ten months, at which adjournments he represents an account in writing to be necessary, in order to make the discovery required of his estate and effects; and he promises from time to time to produce the balance sheet. That not being produced at the last adjournment, and no sufficient reason being given by him for not producing it, it was held, that the commissioners were justified in committing him.

The defendants were commissioners of bankrupt. The question was, whether they were justified in committing the defendant to prison under the circumstances of the case. The cause was tried before Bayley J., at the London sittings after Trinity term, 1820. It appeared in evidence that on the 14th November, 1818, which was the day appointed for the last examination of the bankrupt, questions were put by the commissioners, and answers given, as follows: Q. Where is your balance sheet? A. I have none prepared. Q. Where is the statement of your property? A. I have none prepared. Q. As this is the day appointed for your last examination, why are you not prepared with a statement of your account? A. Having committed no act of bankruptcy, I considered that it would not be required, as I had hoped for an adjournment. Q. Do you wish to prepare a statement of your accounts? A. I beg leave to repeat my protest against the validity of this commission. I cannot be prepared within the time mentioned; but if the examination is adjourned for a sufficient period, I am ready to furnish the assignees with any information in my power respecting the estate.

Semble, That by the 5 G. 2. c. 50. s. 1. the bankrupt is bound to render to the commissioners, if requisite, an account in writing of his estate and effects.

effects, without prejudice; and I will prepare my accounts. In consequence of this there was an adjournment of his last examination to the 5th day of *December*, 1818, when he again prayed further time, and stated that he would apply himself constantly to the making up and balancing of his accounts. On the next and three following adjournments he did not attend, on the alleged ground of illness. On the 25th of *May*, 1819, the question as to the balance-sheet being repeated, he stated that he was not then ready, but again promised to prepare himself with it; and added, that he was not then prepared to make any further disclosure of his estate and effects, but was ready to answer any questions. On the 7th *June*, he stated that he wanted more time to prepare his balance-sheet; and being asked what was the amount of the debts due to him? he answered, "My accounts not being made up, I cannot say; I think they amount to 10,000*l.* I cannot say whether they amount to 15,000*l.*; but I think not so much as 20,000*l.*" The meeting was then adjourned to the 6th *July*, on his promising to furnish a full statement of his accounts, and a proper balance-sheet, to his assignees, by the 25th *June*. On the 6th *July* he said his balance-sheet was not finished, but was in progress; and the meeting was further adjourned to the 10th of *August*, on his promising to furnish the balance-sheet to his assignees by the 30th of *July*. On the 10th of *August*, he said his balance-sheet was not yet prepared, and then the following question was put: Have you, since the 30th of *July*, when you failed to fulfil your promise of furnishing the balance-sheet to your assignees, made any communication to them on the subject of that balance-sheet? *A.* "I have not failed in my promise, nor have

I made

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I made any communication to any one; my balance-sheet not being yet finished, I have not seen it necessary." Q. Is that the only answer you mean to give to that question? A. "I have given, and will still give every diligence to make up my balance-sheet as soon as possible, the accounts being very voluminous, and therefore I could not do it before." Upon this the defendant was committed for not giving satisfactory answers. The learned Judge was of opinion, at the trial, that the defendants were not justified in committing the bankrupt; he, however, reserved the question for the opinion of the Court, whether, under the circumstances, the commitment was lawful. The jury found a verdict for the plaintiff; damages, 200*l*. A rule nisi for entering a nonsuit having been obtained in last *Michaelmas* term,

Adolphus and *F. Pollock* now shewed cause. The defendants were not justified in committing the plaintiff to prison under the circumstances of this case. By the 5 *Geo. 2. c. 30. s. 16.* the commissioners of bankrupt are authorised to commit the bankrupt to prison in three cases only, viz. where he refuses to answer, or does not answer to the satisfaction of the commissioners, or refuses to sign his examination. Here the ground of commitment was, that the bankrupt refused to produce a balance-sheet. That is not a case, therefore, within the statute; and the defendants were not justified in their commitment. It is true that, by s. 4., the bankrupt is bound to assist the assignees in making up his accounts; but if he refuses so to do, the commissioners have no power to commit him. The circumstance of the bankrupt, in this case, having promised, from time

to time, to prepare a balance-sheet, cannot give to the commissioners a power of commitment, which they did not otherwise possess; besides, the proposition of a balance-sheet never proceeded from him, but from the commissioners.

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Marryat, Gaselee, Montagu, and Wilde, contra. The bankrupt was in fact committed in this case for refusing to answer questions lawfully put to him, in order to obtain a full and true disclosure of his estate and effects, within the meaning of 5 Geo. 2. c. 30. By s. 1. he is bound to make such full and true disclosure of his estate and effects, even without any questions being put to him by the commissioners for that purpose. It is clear, however, that the commissioners may lawfully put such questions to him, and if he does not give satisfactory answers, that they may commit. If, therefore, in this case the commissioners had asked him, upon interrogatories, of what his estate and effects consisted, what debts were due to and from him, what his capital originally was, and what his expenditure had been, he would have been bound to give satisfactory answers to such questions. A balance-sheet, in fact, contains a statement in writing which would form answers to such questions. The bankrupt here, in his examination, represented an account in writing to be absolutely necessary, in order to enable him to give a full disclosure of his estate, and he promised, from time to time, to produce a balance-sheet. The reasons given by him, from time to time, for not producing it, are unsatisfactory. *Stanley Goddard's (a)* case is an authority to shew, that the bankrupt, having consented to give a balance-sheet,

(a) This case came on before the Lord Chancellor, in *Michaelmas* term, 1820.

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is bound to produce it. The bankrupt, therefore, in this case, not having given satisfactory answers to the question put to him by the commissioners, relative to his producing a balance-sheet, in effect, has declined to answer questions lawfully put to him by them, relative to the disclosure of his estate and effects. They were, therefore, justified in committing him. The statute itself clearly contemplated that the discovery of the estate and effects to be given by the bankrupt should be in writing: for the fifth section enables him to inspect his books, and to take with him two persons to make extracts from thence, the better to enable him to make a full and true disclosure and discovery of his estate and effects; and the sixth section, which provides for the case of the bankrupt's being in prison, directs that the assignees shall appoint one or more persons to attend him, from time to time, and produce to him his books, papers, and writings, in order to prepare his last discovery and examination, according to the directions before mentioned, a copy whereof, viz. (of his last discovery and examination,) the assignees shall apply for, and the bankrupt shall deliver to them, ten days at least before his last examination. It is clear, therefore, that in the case of the bankrupt being in prison, he is bound to furnish to the assignees an account in writing of his estate and effects; and that affords a very strong argument that the discovery required to be made by the first section should be in writing. Where, indeed, a bankrupt has been concerned in extensive commercial dealings, he can hardly make a full and true disclosure of his estate and effects, without reducing it into the form of a written statement, or, in other words, without producing a balance-

lance-sheet; and if the production of a balance-sheet be absolutely necessary, in order to enable him to make the disclosure of his estate required by the first section, he is bound to produce it. It has been the invariable practice, for a series of years, to require an account in writing from the bankrupt, as appears by the appendix to Mr. *Green's* Treatise on the Bankrupt Laws, published in 1780, p. 432.

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ABBOTT C. J. I am of opinion that the rule for entering a nonsuit must be made absolute. The question is not whether a bankrupt is bound generally to deliver to the commissioners an account in writing of his estate and effects, but whether, under the circumstances of this case, it appears, on the whole matter before us, that the bankrupt has declined or refused to give answers to lawful questions propounded to him by the commissioners, with a view to the discovery and disclosure of his estate and effects. Upon the whole, I am of opinion, that he has declined to give satisfactory answers to such questions. It appears to me, from a careful review of all the provisions of the statute of the 5 *Geo. 2. c. 30.*, that the legislature contemplated that the bankrupt should deliver to the commissioners an account in writing of his estate and effects. The statutes before the time of *James the First* are silent as to any examination of the bankrupt; but by the 13th of *Eliz. c. 7. s. 2.*, the persons acting under the Lord Chancellor's commission had an absolute power over the body as well as the estate of the bankrupt, and they could therefore exercise that power, to compel him to do all that they should think necessary to obtain knowledge of

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his estate. By the statute of 1 James, c. 15. s. 7., it is made lawful for the commissioners to examine the offender (as he is called) upon interrogatories touching his lands, tenements, goods, chattels, debts, &c., as may tend to disclose his estate, secret grants, conveyances, &c.; and by the next section, they (if he refuses to answer) have authority to commit him, until he shall better conform himself. Now if the matter had rested on that statute alone, it would be difficult to say that he was bound to give in a written account, for it imports only that he is to answer interrogatories. By the 5 Geo. 2. c. 30. s. 1., which was made for the further prevention of frauds committed by bankrupts, he is required to surrender himself, and submit to be examined, and on such his examination, fully and truly to disclose and discover all his effects and estate, real and personal, and how and in what manner, and to whom and upon what consideration, and at what time or times he has disposed of, assigned, or transferred any of his goods, wares, merchandizes, monies, or other estate and effects (and all books, papers, and writings relating thereunto,) of which he was possessed, or in or to which he was any ways interested or entitled, or which any person had in trust for him, or for his use, at any time before or after the issuing of the said commission, or where such person or his family or families hath or have, may have or expect any profit, benefit, or advantage whatsoever. If he makes a wilful concealment, to amount of 20l., then he is guilty of a capital offence. Now the words "disclose and discover" import a communication relative to his estate and effects to be by him, without any particular enquiry on the part of those to whom he makes the disclosure; and ;

that the assignees may know that he does make a full and true disclosure, they are authorised, by the fourth section, to require him to attend them, to assist them in making out the accounts of his estate and effects. The object is, that the assignees may not be compelled to take blindly such account as he thinks fit to give them, but that he shall come to them to make it out in their presence, which may be a check on him. The fifth section is compulsory on the assignees, and in favour of the bankrupt. For by that it is enacted, that the bankrupt shall be at liberty to inspect his books, papers, and writings, and to bring with him two persons, at any one time, to make such extracts and copies from thence as he thinks fit; and this is to be done, the better to enable him to make a full and true discovery and disclosure of his estate and effects. He has therefore given to him the power of examining his own books, in order that he may be enabled to make out his accounts, so as to make a full and true discovery and disclosure of his estate and effects; and this rather imports that this disclosure should be in writing. The sixth section is more explicit on this subject, and provides, that in case the bankrupt is in execution, or cannot be brought before the commissioners, the commissioners shall from time to time attend the bankrupt and take his discovery; and the assignees shall have power and are required to appoint one or more persons to attend him in prison from time to time, and to produce to him his books, papers, and writings, in order to prepare his last discovery and examination, (which words, it is to be observed, are thus classed together,) “according to the directions before mentioned; a copy whereof (that

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is, of his last discovery and examination,) the assignees of the estate shall apply for; and the bankrupt shall deliver the same to them or to their order, ten days at least before such last examination. Now it is impossible to understand this section in any other way than as saying, that the discovery of the bankrupt's estate should be in writing; for the bankrupt, if in prison, is entitled to be attended by one or more persons, who are to produce to him his books, in order that he may prepare his last discovery, viz. the discovery of his estate, which must be in writing (because the assignees are entitled to have a copy of it), and ready ten days before he comes up for his last examination, in order to give them an opportunity of considering it, and putting such questions as may be thought necessary, respecting those items which he may think fit to put in that account. The sixteenth section authorises the commissioners to examine the bankrupt, as well by word of mouth as on interrogatories in writing, touching all matters relating to his trade, dealings, *estate, and effects*, and to take down, or reduce into writing, the answers of verbal examinations of every such bankrupt had or taken before them as aforesaid; which examination, so taken down, or reduced into writing, the party examined shall sign and subscribe. And in case any such bankrupt shall refuse to answer, or shall not fully answer, to the satisfaction of the commissioners, all lawful questions put to him by the said commissioners, as well by word of mouth as by interrogatories in writing, or shall refuse to sign and subscribe his examination, so taken or reduced into writing as aforesaid, (not having a reasonable objection either to the wording thereof,

or

or otherwise to be allowed by the commissioners,) they may commit him. That section contains the specific power of examination, together with the authority to commit, if satisfactory answers are not made to such lawful questions as may be propounded to him. This I think is a summary view of all those provisions of the statute that relate to the subject now before the court. Taking the whole together, it seems to me clear that the legislature does contemplate that the bankrupt shall furnish to the commissioners some written disclosure or discovery of his estate and effects; and the uniform practice has been conformable to this construction of the statute. For it appears by Mr. *Green's* treatise on the Bankrupt Laws, that it has been usual for the bankrupt to give in, at his last examination, some written account of his estate and effects. That which is called the balance-sheet contains only the summary of his estate and effects, specifying what debts are due from him, what effects he then possesses, in addition to debts which are due to him, what he has expended, what his capital was, how that has been laid out so as to account for the reason of his becoming a bankrupt. All these matters are exceedingly important, with the view to the certificate which is afterwards to be granted to him. The question then is, whether this bankrupt has not declined to answer questions lawfully put to him respecting the account in writing, which he was bound to deliver. It appears in this case, that on the examination of the 14th *November*, the bankrupt was asked by the commissioners, "Where is your balance-sheet?" in other words: You have come to pass your last examination; are you prepared with an account in writing of your estate and effects? The answer is, "I have none prepared."

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pared." — "Where is the statement of your property?" (which is the same thing as the balance-sheet.) — "Have you not got it?" — "No." — "Why not?" — *A.* "Having committed no act of bankruptcy, I think I am not bound to prepare it." — *Q.* "Do you wish this meeting to be adjourned for a fortnight, that you may prepare a statement of your accounts?" — *A.* "I beg leave to repeat my protest against the validity of this commission: I cannot be prepared within the term mentioned; but if the examination is adjourned for a sufficient period, I am ready to furnish the assignees with any information in my power respecting the estate and effects without prejudice, and will prepare my account." Now the allegation that he was not prepared, because he intended to dispute the commission, is no reason for not making a disclosure of his estate and effects. If there be good reason for disputing a commission, or for suspending a disclosure and discovery, until the validity of the commission shall have been tried, the authority of the great seal would, on proper application, be exercised for that purpose. The bankrupt, however, adopts the balance-sheet, as the best mode of giving the account required of his estate and effects; for he promises to prepare it, if time be given. Then time is given to him. On the 5th *December*, a second examination takes place; and he is asked if he has got a statement in writing; but he says, he is not prepared to make a full disclosure, and prays time till the 5th of *January* next, within which time he binds himself to make up the accounts. Time is given till the 10th of *August*. At each meeting the enquiry is made, "Are you ready with that account in writing which you have originally said you would give us, and which by law you certainly ought to give us, unless you have

have reasonable excuse?" He is not ready. Some questions are put to him as to his estate. He is asked, "Do you know whether your debts or your credits are 10,000*l.* or 15,000*l.*?"—"I really cannot tell, without the account in writing." When questions are put to draw from him answers as to his estate and effects, he answers, he cannot tell without the account in writing, which he had before promised to make out as the most convenient manner of making that disclosure which the law requires. From time to time, frivolous excuses are made; and in the whole interval not one single step is taken by the bankrupt towards the accomplishment of that object, which he had originally said he would accomplish, which the legislature manifestly intended should be obtained from a bankrupt, and which the ordinary practice required. I view the whole, considering it only as one examination. I am clearly of opinion, that the bankrupt has refused and declined to give answers to those lawful questions that were propounded to him by the commissioners, in order to obtain a disclosure and discovery of his estate and effects. I think, therefore, that the defendants were justified in committing him, and that the rule for a nonsuit should be made absolute.

BAYLEY J. The original impression on my mind in this case was, that the commissioners had exceeded their authority, in requiring a balance-sheet from the bankrupt, and that continued to be my opinion, until a very late period of the argument. But now that my attention has been fully called to the different clauses of the 5th *Geo. 2. c. 30.*, I am satisfied that the commissioners, in this case, have required no more from the bankrupt than they were warranted in doing, and that

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the bankrupt has declined to answer questions lawfully put to him. The first clause of the 5th Geo. 2. directs, "that the bankrupt shall fully and truly disclose and discover all his estate and effects, real and personal;" and on his examination, he is to deliver up his books and writings. That clause is, however, perfectly silent as to the question whether there is to be a discovery or disclosure in writing made by the bankrupt. The sixth section provides for the case where the bankrupt has not access to his own books, and directs that those books shall be carried to him; and that "in that case he shall prepare his last discovery and examination, according to the directions before mentioned." Now there are no directions before mentioned, except as to the discovery and disclosure expressly pointed out and provided for by the first section. The sixth section then proceeds, "a copy whereof," (that is, of that last discovery and examination, according to the direction before mentioned,) "the assignees of the estate shall apply for, and the bankrupt shall deliver to them, or their order, ten days at least before his last examination." If the bankrupt is therefore in custody, and if the books are carried to him, under the provisions of the sixth section, he is bound to make a discovery and disclosure of his estate, in order that he may be able to furnish a copy of that discovery, for his examination; and for that purpose, it is quite clear that it must be in writing; and that raises a very strong argument, that, under the first section, the disclosure and discovery which he is to supply to the commissioners is also to be in writing. For the purposes of this case, it is not necessary to lay down, as a general rule, that the bankrupt shall in all cases be compelled to make such
dis-

disclosure and discovery in writing, because here the bankrupt himself, from time to time, describes that mode of proceeding as necessary, for the purpose of making his disclosure and discovery. He therefore accedes to the application for a disclosure and discovery in that way, as being the mode best adapted to the purpose. Supposing, however, that the commissioners have not strictly a right to insist upon a discovery in writing, and that the bankrupt might refuse to furnish it; then he must give such a disclosure and discovery as, under all the circumstances, he may be capable of giving; and if he gives it by word of mouth, it must, at all events, be as complete and full a disclosure as if it had been in writing. He is bound, under the first section, to prepare himself, at the time when the commissioners are to meet, to make a full disclosure; and if he cannot do that without writing, then it must be done in writing. It occurred to me at one period, that it might be a hardship on a bankrupt to force him from time to time to be going through a very long and laborious investigation, when he might not have the means of supporting himself during the intermediate period of time. And if an extraordinary case of that description were to occur, I have no doubt but that the commissioners (if the assignees refused the bankrupt the means of subsistence) would think that a reasonable excuse for the disclosure not having been made at any of the periods appointed for that purpose, and would from time to time enlarge the period, until the assignees and creditors should consent to furnish the means of subsistence to the bankrupt in that intermediate time. That observation gets rid of a difficulty which once pressed on my mind. It seems to me, that it is the duty of the bankrupt,

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rupt, before the period of time fixed for his last examination, to put himself in a situation to disclose every thing which the first section of the act requires ; and that if it be essential that he should have written documents, in order fully to do so, he should get those written documents prepared. Since the passing of the statute, the uniform practice has been, at the last examination, for the commissioners to ask the bankrupt for a balance-sheet, or, in other words, for a discovery and disclosure in writing of his estate and effects. When the commissioners, at the first meeting, asked the bankrupt for his balance-sheet, if he had refused to give a written account, they might have called upon him then to make the same disclosure which a balance-sheet would exhibit. They might have asked him of what his estate consisted, how he had disposed of all the property which he possessed before the bankruptcy, and what debts were due to and from him ; and they might then have reduced these answers into writing. Instead of that, however, the bankrupt agrees to prepare a balance-sheet ; and in many of his answers, describes an account in writing as absolutely necessary to make a full and true disclosure of his estate ; for he says he cannot tell how much his debts or credits are, till his accounts are made up. I think, therefore, that the non-production of a balance-sheet, after so many adjournments of the last examination, and after he had frequently promised to prepare one, was, in fact, declining to answer what his estate and effects were. If the bankrupt had refused to answer the questions, Of what do your estate and effects consist ? how do you account for the amount of your debts ? what is due to you ? what is due from you ? I should have had no doubt that he would have refused to answer questions lawfully put to him,

him, within the 16th section of the 5 *Geo. 2. c. 30.* I think his neglect to produce the balance-sheet is substantially the same as if he had refused to answer those questions. On that ground, therefore, I think that the commissioners were justified in committing him, and that judgment of nonsuit ought to be entered.

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BEST J. It is not necessary for us in this case to decide whether commissioners have a right to require a balance-sheet, because it is clear from *Goddard's* case, that if the bankrupt chooses to submit to this as a mode of examination, when once he has so submitted, he must conform to it. Now I am quite clear, on looking at the evidence, that he did submit himself to this mode of examination; for he states, "If you will give me till such a time, I will prepare my balance-sheet." In consequence of his giving that answer, the commissioners might avoid putting certain questions which would have been put if he had not chosen to give an answer in writing instead of an answer by parol. I am of opinion, therefore, that whether the commissioners had authority or not, under this act of parliament, to require a balance-sheet, as this man has consented to furnish a balance-sheet, he was bound to do it; and that not having given a satisfactory reason for his neglecting to do so, the defendants were justified in committing him. Looking at all the provisions of the 5 *Geo. 2. c. 30.*, and the constant practice which has prevailed from the time of passing that act to the present, I have no doubt that where it is fit, from the nature of the concerns of the bankrupt, that a balance-sheet should be produced, the commissioners may require it. The statute of *James* authorizes the commissioners to examine the bankrupt
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upon interrogatories touching his lands, &c. and such other things as may tend to disclose his estate. That imports examination by question and answer. But the statute of the 5 Geo. 2. c. 30. s. 1. goes much further, and compels the bankrupt to submit to be examined, and upon such his examination fully and truly to disclose and discover all his estate and effects. By that section of the statute, therefore, the bankrupt is bound to make this discovery, whether any questions are put to him in that respect or not; and if that full and true disclosure cannot be made without writing, he is bound to furnish it in writing, and the commissioners are bound to require it. The uniform practice certainly has been to require such a balance-sheet of the bankrupt; and it appears to me that such practice is well warranted by the sound construction of this act of parliament; for by section 4th the bankrupt is to attend, in order to assist the assignee in making out the account of his estate. By the 5th section he is authorized to inspect his books, and to take two persons with him to make such extracts and copies as he shall think fit, the better to enable him to make a full and true discovery and disclosure of his estate and effects. Now the circumstance of his being authorized to make extracts and copies from his books, &c. rather imports that the disclosure afterwards to be made should be in writing. The 6th section, however, almost puts it beyond all doubt, that such extracts and copies taken from his books are allowed him for the express purpose of making a full and true disclosure of his estate and effects in writing; for it provides, that in case the bankrupt be in prison, the assignees shall appoint one or more persons to attend the bankrupt from time to time, and to produce to him his books, papers,

papers, and writings, in order to prepare his last discovery and examination, according to the directions before mentioned; a copy whereof the assignees shall apply for, and the bankrupt shall deliver to them ten days at least before his last examination. Now it is clear, therefore, that the discovery required by this section must be in writing, for if not, how could any copy of it be made? The first section, indeed, does not in express terms require the discovery then mentioned to be in writing. It seems to me, however, that under that section the commissioners may, in their discretion, require the bankrupt to make such discovery in writing or by parol, according to the circumstances of each particular case. Upon the whole, I am of opinion that the bankrupt's neglect to produce a balance-sheet is substantially a refusal to give answers to questions lawfully put to him by the commissioners relating to the discovery of his estate and effects, and that the defendants were therefore justified in committing him, and, consequently, that this rule for entering a nonsuit must be made absolute.

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Rule absolute. (a)

(a) *Holroyd J.* was absent.

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JELL *against* DOUGLAS.

In assumpsit by one of two surviving partners, the fact of the plaintiff being surviving partner must be stated in the declaration; and therefore a count for goods sold by him to the defendant is not supported by proof that the goods were sold by the plaintiff and his deceased partner.

ASSUMSIT for goods sold and delivered *by Jell* to the defendant. Plea, general issue. At the trial, before *Abbott C. J.*, at the last summer assizes for the county of *Kent*, the proof was, that the goods were sold to the defendant by the plaintiff and his son, who were in partnership. The son had died before the commencement of this action. It was contended that this was a variance, inasmuch as the contract stated in the declaration was with the plaintiff alone; whereas that given in evidence was with the plaintiff and another. *Abbott C. J.* reserved the point, and directed the jury to find a verdict for the plaintiff, with liberty to the defendant to move to enter a nonsuit. A rule nisi for that purpose having been obtained in last *Michaelmas* term,

Marryat and *Chitty* new shewed cause. This is no variance; for the material allegations in the declaration are proved. It is true that the defendant is indebted to the plaintiff alone for goods sold and delivered by him. They are not alleged to be the goods *of* the plaintiff, but merely that they were sold *by* him. *Slipper v. Stidstone* (a) is an authority to shew, that a debt due to the defendant, as surviving partner, may be set off against a demand on him in his own right; and they referred to the note of Mr. Serjt. *Williams* to *Cabbell v. Vaughan* (b),

(a) 5 T. R. 498.

(b) 1 Saund. 291. g.

to shew that the law upon this subject was at least considered by him as very doubtful.

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ABBOTT C. J. It is a well-established rule, that where two persons are joint-sellers of goods, they must both join in an action brought to recover the price. It was decided in *Richards v. Heather* (a), that a party may maintain an action against a surviving partner without describing him as such; and the reason of that decision was this, that if the partners had been alive, and one only was sued, that circumstance could only be taken advantage of by plea in abatement, and was no defence upon the general issue. But if one of two joint-contractors sue, both being alive, that is a variance, and a good defence upon the general issue. It seems, therefore, to be reasonable, that where a surviving joint-contractor sues, the fact of his being survivor should appear in the declaration. In a note to *Webber v. Tivill* (b), Mr. Serjt. Williams lays it down, that it is necessary that all the persons with whom a contract has been made, if living, should join in the action, and if any of them are dead, that fact should be stated. From my own experience I can say, that that has been the general practice, and I think it ought not to have been departed from in this instance. The rule for a nonsuit must be made absolute.

Rule absolute.

Gurney and *Comyn* were to have argued in support of the rule.

(a) 1 B. & A. 29.

(b) 2 Saund. 121. n. 1.

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WYNNE, Bart., *against* TYRWHITT.

Entries in a steward's book above thirty years old, and coming from the proper custody, are admissible in evidence, without proving the hand-writing of the steward. *Semble*, that the rule extends to all written documents coming from the proper custody.

THIS was an action of trespass, brought by the plaintiff, as lord of the manor of *Llanwest*, for trespasses committed on the wastes of that manor, which he claimed as lord. The defendant set up title in Mrs. *Eyton*, who was the owner of four tenements in the manor. The plaintiff obtained a verdict. At the trial, before *Richardson J.*, the books of the stewards of the manor were produced, from the year 1713 to 1787, and entries therein, of receipts of rent, read in evidence on the part of the plaintiff. They were produced by the then steward of Sir *Watkin Williams Wynne*. It was contended, on the part of the defendant, that in order to make the entries in the steward's book of the year 1787 admissible evidence, his hand-writing should be proved. *Richardson J.* overruled the objection, on the ground that it appeared to come from the proper custody, and was more than thirty years old. A rule nisi for a new trial having been obtained in last *Michaelmas* term, on the objection taken at the trial, the Court called upon

Jervis and *Chitty* to support the rule. They contended that the entries in the steward's books were not admissible evidence without proof of his hand-writing and the fact that he was dead. In the case of deeds indeed, the circumstance of their being thirty years dispenses with the necessity of proof of their execution but that rule does not extend to other written documents.

Per Curiam. The rule is not confined to deeds or wills, but extends to letters and other written documents coming from the proper custody. It is founded on the antiquity of the instrument, and the great difficulty, nay, impossibility of proving the hand-writing of the party after such a lapse of time. (a)

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Rule discharged.

(a) See *Rees v. Ryton*, 5 T. R. 259. *Fry v. Wood*, Selw. N. P. 535. *Dean and Chapter of Ely v. Stewart*, 2 Atkyns, 44.

ATKINS *against* PALMER.

THIS cause was tried before *Abbott C. J.* at the *London* sittings after last *Trinity* term. The only question was, whether a commission issued out of the Court of Chancery to examine witnesses at *Leghorn* had been properly executed, so as to make the depositions admissible evidence on the part of the plaintiff. It appeared by the commission, that the commissioners were authorised to examine witnesses upon interrogatories, and to take such their examinations, and reduce them into writing in the *English* language on parchment, and then to send the same to *England* with a certificate in what manner the oath was administered to such witnesses who could not speak or understand the *English* language, and power was given to them to swear an interpreter, well and truly to *interpret* the depositions, in the first instance, were reduced into writing in the foreign language, and translated by the interpreter into the *English* language within an interval of six weeks: Held, that the commission was well executed by the commissioners returning the depositions so translated into the *English* language.

A commission for the examination of witnesses in a foreign country, directed the commissioners to examine the witnesses on interrogatories, and to reduce the examinations into writing in the *English* language, and send the same to *England*, and to swear an interpreter to interpret the depositions of such witnesses as did not understand the *English* language. It appeared by the return that the

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oath and interrogatories which should be administered and exhibited by either party to such witnesses who did not understand the *English* language, out of the *English* into the language of such witnesses, and also to interpret their respective depositions taken to the said interrogatories, out of the language of such witnesses into the *English* language. The depositions were returned in the *English* language as well as the certificate, on oath of the interpreter that he was acquainted with the idioms of the *English* and *Italian* languages, and that he had faithfully interpreted to the witnesses the interrogatories and cross interrogatories, and that he had made a true and faithful *translation* of their depositions from the *Italian* originals duly signed by the respective witnesses, which he had carefully and faithfully engrossed on the parchment containing the depositions, and that he had also truly and faithfully interpreted the oath administered to the witnesses. It appeared by the return that the depositions were taken on the 20th *September*, 1819, and the certificate of the interpreter, which was annexed to and returned as part of the return to the commission, was dated the 7th *November*, 1819. It was objected at the trial that these depositions were not admissible in evidence, inasmuch as the commission did not appear to be well executed, for the original depositions were not reduced into writing in the *English* language, but a translation from them was made six weeks after they were taken. *Abbott* C. J. held the evidence to be admissible, but gave the defendant leave to move to enter a nonsuit if the Court should be of a different opinion, and a rule nisi for that purpose having been obtained in last *Michaelmas* term,

Marryat

Marryat and *Adams* now shewed cause. The commissioners were selected by the respective parties, and were present as their agents at the time the depositions were reduced into writing, and at that time might have objected to the mode of proceeding. The parties therefore, by their agents having acquiesced in it, it is now too late to make the objection. The mode adopted in this case is in conformity with the general practice. The party at all events ought to have applied to the Court of Chancery to suppress the depositions.

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The *Solicitor-General*, *Gurney* and *Campbell* contra. This commission was not well executed. The examination of the witnesses ought to have been interpreted at the time it was taken. Here the depositions were translated into the *English* language six weeks after they were taken. The commission directed that the examinations should be reduced into writing in the *English* language, whereas they were taken in the *Italian*. By the commission, it was directed that the interrogatories and depositions should be interpreted, which means that the oral statement should be rendered into the *English* language at the time it was taken. In this case it was rendered into the *English* language from a written paper six weeks afterwards, which is a mere translation.

ABBOTT C. J. The question before the Court is, whether it appears by the return to the commission, that the commissioners have duly executed it. They are persons appointed by the Court of Chancery in

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consequence of a selection made by the litigant parties, and we are to presume that they have discharged their duty, if by reasonable interpretation we can do so. We are not to look out critically for objections, nor are we blindly to give credit to all they have done, but we are to see whether they have substantially discharged their duty. The commission in the first place directs them to take the examinations and reduce them into writing in the *English* language on parchment, and to send them to the Court of Chancery. Now that cannot be understood to mean that they are to send the identical paper or parchment on which they make their minutes, because the witnesses may occasionally make corrections in their testimony. The examinations would necessarily be first taken in a rough manner, and would afterwards be fairly copied out. The commission then makes a distinction between *English* and foreign witnesses, for as to the latter, the commissioners are directed to swear an interpreter, well and truly to interpret the oaths and interrogatories administered and exhibited by either party to the witnesses who do not understand the *English* language, out of the *English* language into the language of the witness, and to interpret their respective depositions out of the language in which they are made into the *English* language. It is not denied that the interpreter was so sworn, neither is it suggested that he has not fairly translated what the witnesses deposed, but the objection is, that it appears by the certificate of the interpreter, that the translation was made six weeks after the commission was taken, and that we are to collect from thence, that he did not translate the answers of the witnesses as the examinations went on, but

but that he took down the original depositions in the *Italian* language, and afterwards translated them into the *English* language, and sent them here. Supposing however, that the commissioners understood the language in which the witnesses were examined, (which we must presume they did,) and that they were satisfied that what was said in *Italian* was faithfully taken down, I do not see that any thing more was required of them than to leave it to the interpreter afterwards to render upon oath the depositions into *English*, which he appears to have done. I think therefore, that the commission has been well executed, and consequently that this rule ought to be discharged.

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BAYLEY J. I am of the same opinion. The commission does not appear to me absolutely to require that the depositions of the witnesses should be translated at the time they are taken. The commissioners may require that to be done if they think fit; but they are not bound so to do. It must be recollected here, too, that the commissioners are selected by the litigant parties, and by adopting the translation returned, the commissioner selected by the defendant says, that he is satisfied with that as the true translation of the depositions made by the witnesses.

BEST J. concurred.

Rule discharged.

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PULLING and Others, Assignees of LAVERS, a
Bankrupt, *against* TUCKER.

A fraudulent conveyance, made voluntarily by a trader, in order to give a preference to particular persons to the prejudice of his general creditors, is an act of bankruptcy, although the bankrupt subsequently continued to carry on his trade for three years, at the end of which time a commission issued.

ACTION by the plaintiffs, assignees of *Lavers*, a bankrupt, for money had and received. At the trial before *Wood* Baron, at the *Devon* Spring assizes, 1820, the question was, whether, on the 18th of *December*, 1816, when the money sought to be recovered was paid to the defendant by the bankrupt, the latter had committed an act of bankruptcy? The defendant was then the solicitor of the bankrupt. It appeared that from *June*, 1816, to *January*, 1817, the bankrupt was in insolvent circumstances. A deed, of the 13th *December*, 1816, prepared by the defendant, was produced on the part of the plaintiff, which recited that *Thomas Lavers* had agreed to advance the bankrupt 300*l.*, *William Lavers* had agreed to lend him 700*l.*, and one *Cranch* 500*l.*, and the advance of these sums of money, and the receipt of them by the bankrupt was declared by the deed to have taken place at the time of the execution thereof, and a receipt for those sums was indorsed on the back, signed by the bankrupt and witnessed by the defendant's clerks. The deed then purported to convey the bankrupt's equity of redemption in several premises therein mentioned, in order thereby to secure the several sums so stated to have been advanced, and such further sums as then were or should thereafter become due to the parties, and the premises were charged with such demands accordingly; and the deed contained several provisoes and covenants for the purpose

pose of making such charge effectual. The bankrupt continued to carry on his trade until the 27th *September*, 1819, when the commission issued. This deed was found by the messenger to the commission among the bankrupt's papers. *Cranch*, one of the persons named in the deed, was called as a witness, and stated, that though he was a creditor for 500*l.*, the deed had been prepared without his knowledge, and that the first time he heard of it was at a meeting of the commissioners after the bankruptcy. The subscribing witness proved that he saw no money paid at the time when the deed was executed. The *Lavers* mentioned in the deed were brothers of the bankrupt. The learned Judge left it to the jury, whether the deed of the 13th of *December*, 1816, was not a fraudulent conveyance, voluntarily made by the bankrupt, in order to give a preference to particular persons, to the prejudice of his general creditors: if they thought it was, then the learned Judge was of opinion that it was an act of bankruptcy, and would entitle the plaintiffs, as assignees, to recover. The jury found for the plaintiffs. A rule nisi for a new trial having been obtained in last *Easter* term, the Court now called upon

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Moore, *Adam*, and *Bayly*, in support of the rule. In order to make a conveyance of part of a man's property an act of bankruptcy, it must have been made in contemplation of bankruptcy. *Jacob v. Shepherd*. (a) Now in this case there is no evidence that the bankrupt contemplated bankruptcy at the time when he executed this deed. He continued in trade for three years afterwards, and the money stated in the deed to have been advanced by his brothers may have been for the

(a) 1 *Burr.* 478.

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very purpose of enabling him to carry on trade, and so to avoid bankruptcy. If this be an act of bankruptcy, every trader who mortgages his real estate commits an act of bankruptcy. Secondly, The deed here had never been delivered to the parties who were interested in it; they, therefore, could derive no benefit whatever from it. The bankrupt may have kept it in his possession for the purpose of raising money as his occasions might require. It may, therefore, be considered in the nature of an escrow. If this is held to be an act of bankruptcy, it will be in the power of every bankrupt in future, by executing a private deed, and keeping it in his custody, to produce it afterwards, and use it as an act of bankruptcy, having relation back to the time of execution.

ABBOTT C. J. I am of opinion, on the authority of the case of *Morgan v. Horseman* (a), that this question was properly left to the jury. In that case it was held, that a deed, whereby a debtor, being pressed, conveyed estates in trust to sell and to pay the pressing creditor, with a further trust to pay his debts to certain relatives, in order to give them an undue preference in contemplation of bankruptcy, was an act of bankruptcy. It is true that in that case it was expressly stated, that the deed was executed in contemplation of bankruptcy; but *Mansfield* C. J. lays no stress on that circumstance, for he expressly says, that "a conveyance, either of all or part of a man's property, in favour of fewer than all his creditors, is an act of bankruptcy; because it is the means whereby the creditors may be defeated or de-

(a) 3 Trunt. 241.

layed."

layed." The question, therefore, in such a case, is, whether the deed be voluntarily made by the bankrupt, in order to give a preference to particular creditors, to the prejudice of his general creditors. That was the very question submitted to the jury by the learned Judge in the present case. Indeed, if it were material that the deed should have been executed in contemplation of bankruptcy, there is very strong evidence to shew that it was so done in this case; for the bankrupt being in insolvent circumstances, conveys his real estate to certain persons as a security for debts then due, or any other debts which might accrue due. Such a deed, given under such circumstances, would make bankruptcy inevitable, and a man must be supposed to contemplate the consequence of his own acts. I think, therefore, if the case were to go down to a new trial, the jury would, upon this evidence, be compelled to find the same verdict.

BAYLEY J. concurred.

BEST J. By the first of *James 1. c. 15.* it is enacted, that every trader who shall make, or cause to be made, any fraudulent grant or conveyance of his lands, goods, or chattels, to the intent, or whereby his creditors *may be defeated or delayed* for the recovery of their just and true debts, shall be adjudged a bankrupt. The statute does not, therefore, require that the conveyance should be made in contemplation of bankruptcy; but it is sufficient if it be such whereby the creditors may be delayed. Now, in this case, the deed was executed in favour of two of the bankrupt's brothers, and of *Cranch*, who, though a creditor, did not know of the existence
of

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of the deed until after the bankruptcy. As far, therefore, as he was concerned, it was a voluntary conveyance, giving him a preference over the other creditors. It was proved that no money was actually advanced at the time of the execution of the deed. The bankrupt's brothers could, therefore, only be his creditors for a former debt; and if so, the effect of this deed was to give them an undue preference. That was, however, a question for the jury; and I think it was most properly submitted to them to consider whether the effect of the deed was to give a preference to particular persons, to the prejudice of the general creditors. If that was the effect of the deed, the creditors might thereby be delayed; and it therefore constituted an act of bankruptcy within the meaning of the statute of *James*. It has been further objected, that inasmuch as this deed remained in the possession of the bankrupt, it might be considered as an escrow. It appears, however, upon the evidence, that it was executed as a deed; and, therefore, I am of opinion that it cannot be considered as an escrow.

Rule discharged.

Pell Serjt., *Gaselee*, and *Wilde*, were to have argued against the rule.

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DECLARATION stated, that defendant bargained for and bought of the plaintiffs; and the plaintiffs, at the request of the defendant, sold to the defendant a certain quantity, viz. 1826 bags of *East India* rice, at the rate of 13s. 6d. for each and every hundred pounds' weight thereof, according to the conditions of sale of the *East India* Company, prompt in three months, deposit 10l. per cent., to be put up at the next *East India* Company's sale by the proprietors, if required, and in consideration of the premises and that plaintiffs, at the request of the defendant, had undertaken and faithfully promised to deliver to the defendant the rice, upon the terms and conditions aforesaid, when they should be requested; the defendant undertook to accept the rice of plaintiffs, and to pay them for the same. Breach, that the defendant, although requested, and although the time for the defendant to have accepted and paid for the rice, upon the terms and conditions aforesaid, had long since elapsed, had not accepted the same. Counts for goods sold and delivered, goods bargained and sold. Plea, non assumpsit.

At the trial before *Abbott C. J.*, at the *London* sittings after last *Michaelmas* term, it appeared that the plaintiffs, merchants in *London*, had employed *Dubuisson* and Co., brokers, to sell a quantity of *East India* rice, and that they, in pursuance thereof, on the 15th of *May*, 1820, sold to the defendant a quantity of rice, under the following contract: "Bought, by order and

bidding taking place to that extent, he bought it in: Held, that he could not afterwards repudiate the contract.

Declaration stated that defendant bargained for and bought of plaintiffs a quantity of *E. I.* rice, according to the conditions of sale of the *E. I.* Company, to be put up at the next *E. I.* Company's sale by the proprietors, if required, at a certain price there mentioned. The proof was, that, besides these conditions, the rice was sold per sample. This is no variance; the words "per sample" not being a description of the commodity sold, but a collateral engagement that it shall be of a particular quality.

The rice did not correspond with the sample; but the defendant, after seeing fresh samples inferior in quality to the original purchase sample, put it up at the *E. I.* Company's sale, at a limited price; and no

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for account of Mr. *A. Palmer*, of Messrs. *Parker* and Co., ex *Hadlow*, per sample, 1826 bags *East India* rice, at 13s. 6d. per cwt., Company's conditions, prompt three months, deposit 10l. per cent., to be put up at the next *East India* sale by the proprietors, if required." On the 5th *June*, 1820, the rice was put up for sale at the public sale of the *East India* Company, by the defendant's orders; but no bidding having been made to the extent of the limit put upon it by the defendant, it was bought in for him, in the name of the plaintiffs, for the purpose of avoiding the payment of an auction duty. Upon that sale, fresh samples were drawn and exhibited; and these samples were inferior in quality to the sample exhibited to the defendant when he purchased. The defendant himself attended the sale, and had an opportunity of seeing the samples last drawn. About a month after this sale, the defendant, for the first time, mentioned to *Dubuisson* that the rice purchased did not correspond with the purchase sample; and about ten days before the prompt, he gave the broker an order to re-draw samples. These proved not equal to the original purchased samples, but corresponded with the samples exhibited by the *East India* Company previous to their sale. The prompt expired on the 15th *August*; and on the 14th of *August*, 1820, the defendant declined accepting the rice, on the ground that it did not correspond with the purchase sample. It was objected at the trial that there was a variance in the contract declared on, and that given in evidence; inasmuch as the latter was a contract for rice *per sample*, whereas the contract stated in the declaration was for rice generally. The Lord Chief Justice overruled the objection, but gave the defendant leave to move to enter a nonsuit. It was then

then contended, on the part of the defendant, that inas-
 much as the plaintiffs had contracted to deliver to the
 defendant rice corresponding with the sample, the latter
 was entitled to repudiate the contract at any time, if the
 bulk did not in fact correspond with the sample. The
 Lord Chief Justice was of opinion that he was bound to
 do so within a reasonable time, and he left it to the jury
 upon the evidence, to say whether the defendant had
 rejected the rice within a reasonable time. The verdict
 was found for the plaintiffs; and a rule nisi for entering
 a nonsuit or a new trial having been obtained, on the
 objections taken at the trial in last *Hilary* term,

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Scarlett and *Campbell* now shewed cause. The plain-
 tiffs have proved the whole of the contract set out in the
 declaration. It is true, that the contract proved con-
 tains a collateral stipulation that the goods sold shall
 correspond with the sample; but it is laid down in
Clarke v. Gray (a), that in declaring on a contract not
 under seal, consisting of several distinct parts and collate-
 ral provisions, it is sufficient to state so much of it as con-
 tains the entire consideration for the act, and the entire
 act or duty which is to be done (including the time, man-
 ner, and other circumstances of its performance) in virtue
 of such consideration, the breach of which act or duty
 is complained of. Here, that rule has been sufficiently
 complied with, and consequently this is no variance.
 Upon the second point, it is a general rule, that if a
 party buy goods by sample, and they do not correspond
 with the sample, he is at liberty to reject them; but
 then he is bound to make his objection within a reason-

(a) 6 *East*, 564.

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able time. In this case, the defendant did not object to the quality of the goods until three months after the purchase. He saw the samples exhibited at the *East India Company's* sale, which were inferior to the purchase sample, consequently he was then aware that the bulk did not correspond with the sample; yet, notwithstanding he had a full knowledge of that fact, he takes to the goods as his own by putting them up for sale: he is therefore precluded from objecting to their quality.

The *Solicitor-General, Tindal, and Evans*, contra. The plaintiffs, by their contract having undertaken to deliver an article of a particular quality, are bound to declare upon that contract, and to set out in the declaration that part of the contract which is matter of description. It is, indeed, part of the consideration which induces the purchaser to agree to pay the stipulated price, and the whole of the consideration must be stated. *Tye v. Finmore (a)* is an authority to shew, that where goods are sold by a contract which contains a description of their quality, it is a ground for nonsuit that they do not answer that quality. Secondly, the plaintiffs cannot recover at all in the case of sale by sample, if the goods do not correspond with the sample; for that, in effect, is an express warranty that the goods shall be of a given quality. In *Yates v. Pym (b)*, *Gibbs C. J.* lays it down, "if a purchaser does not object to the quality in a reasonable time, a strong use may be made of that circumstance; but the use is, that a conclusion arises that the injury has accrued since the sale; that, however, may be rebutted." That is an authority to shew, that where

(a) 3 *Campb.* 462.(b) 6 *Taunt.* 446.

the thing is warranted to be of a particular quality, it is a good defence to an action brought for the price that they were not of the quality. At all events, the defendant must be shewn to have had a full knowledge of the difference of quality between the bulk and the sample, and to have accepted the goods with that knowledge. Now, here, the rice itself was at *Woolwich*; the defendant, after the *East India Company's* sale, went there, examined the rice, and within three weeks made the objection.

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ABBOTT C. J. I am clearly of opinion, that there ought not, in this case, to be a nonsuit on the ground of variance. The words per sample, introduced into this contract, may be considered to have the same effect as if the seller had, in express terms, warranted that the goods sold should answer the description of a small parcel exhibited at the time of the sale. Now if there had been such an express warranty in this case, I should be of opinion that the plaintiff would not be bound to set it out in his declaration, for he is only bound to set out the contract for the breach of which he declares. The words per sample are not a description of the commodity sold, but a mere collateral engagement on the part of the seller, that it shall be of a particular quality; the breach of that engagement may furnish a matter of defence to the defendant, but the plaintiff does not rely on it, and need not state it in his declaration. Upon the other point, I stated to the jury, that although the declaration did not allege this to be a sale by sample, yet it was a good defence, that the goods sold did not correspond with the sample, unless the defendant, by his own conduct, had precluded himself from taking that

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that objection. The general rule undoubtedly is, in the case of a sale by sample, that the purchaser may reject the commodity, if it does not correspond with the sample; but every man may waive a rule of law which is in his own favour. Now I do not say that in every case a purchaser is bound to examine immediately, whether the goods correspond with the sample; but I am of opinion, that by suffering the rice to be put up for sale, after he knew, by the fresh samples drawn from the bulk, that it did not correspond with the original purchase sample, and by fixing a price below which the rice was not to be sold, and thus taking his chance of that sale, the defendant did in fact consent and agree, that, as far as he was concerned, the goods should be considered as corresponding with the sample. If at that time he had determined not to take the rice, the plaintiffs, at least, should have had an opportunity of determining for themselves, whether they would or would not suffer the goods to go into the hands of another buyer at that sale, for a price inferior to that which the defendant had given. By taking the chance of making a profit at that sale, he deprived the plaintiffs of that opportunity. In justice and conscience, therefore, he ought to be estopped from objecting that the goods did not correspond with the sample. I think, therefore, that there is no ground either for a nonsuit or a new trial, and that this rule ought to be discharged.

HOLROYD J. (a). I am of the same opinion. The objection of variance applies to those cases only where the declaration states one ground of action, and the party gives proof of another. In that case the plaintiffs must

(a) Bayley J. was absent at Chambers.

be

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be nonsuited, because the defendant comes prepared to defend himself only against the contract stated in the declaration. That is not the present case. Though the goods are sold by sample, still it is true that there was a sale of goods as described in the declaration, viz. such a quantity of such kind of goods; the contract, besides, states them to have been sold by sample. That is a collateral contract on the part of the seller, that the goods should correspond with the sample. If they do not answer the sample, the effect of that is, that the defendant may not be bound to accept them; or, if he does so, he may have a right of action for the damages he sustains by reason of their not corresponding with the sample. I am, therefore, of opinion that the objection as to the variance cannot prevail. Then, as to the next question, I am of opinion that the defendant, after what has happened, cannot now say that this contract is wholly void on the ground that the goods do not correspond with the sample. By the terms of the contract he has a right to require the rice to be put up for sale in the name of the original proprietors. The samples at the public sale were inferior to the original purchase sample. The defendant saw them; and he then had a right to annul the contract altogether. He, however, does not do that; but he treats the goods as if they actually corresponded with the sample. Now a purchaser may perhaps suffer less inconvenience by taking the goods, though inferior in quality to the sample, than by refusing them altogether; and if he takes them under those circumstances he will be entitled to such damage as he may sustain by their not answering the description in the contract. The defendant treats the goods, at the time of the second sale, as if they were his own

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property, for he actually attempts to dispose of them as such. By assuming the dominion over the property, he treats the first sale to him as a valid sale, and he cannot afterwards insist that it is void. I think, therefore, that the plaintiff, though he could not be obliged to part with the rice, on account of his lien, till the deposit was paid, still may insist on the defendant's taking the rice and paying for it, subject to the right of the latter to bring an action for damages, on the ground that they did not correspond with the goods actually agreed for. I think, therefore, that there is no ground either for a nonsuit or a new trial, and that this rule ought to be discharged.

BEST J. I entirely agree with the rest of the Court on both points. It is unnecessary for me to add any thing to what has already been said by the Court upon the objection of variance. With respect to the other point, I am clearly of opinion that the plaintiff is entitled to maintain this action, although it appears that the bulk does not correspond with the sample. In this case, if the rice had been transferred into the name of the purchaser, that would have amounted to a symbolical delivery. That has not been done in this case, merely because, if it had been so transferred to his name, and bought in at the sale, a duty would have been payable. If, however, the purchaser professes to act on the contract, although the goods be not actually transferred into his name; if he avails himself of the privilege of selling, though under the name of another owner, that must be considered as a sale by himself; and the taking upon himself the disposition of the goods is equivalent to an acceptance. It appears here, that
before

before the goods were put up a second time to sale by the defendant, he knew that they did not exactly correspond with the sample. If, before the second sale, he had rejected the goods, he might have brought himself within the principle laid down in *Yates v. Pym* (a), but he thinks proper to take the chance of gaining a profit by bringing them to a good market, intending, at the same time, if they did not sell to a profit, to attempt to return back the goods. I think, however, that by treating the goods as his own, he has placed himself in a situation in which he is in no condition to answer an action for goods sold. He may still bring an action for breach of the warranty; but it is too late for him to repudiate the contract. I think, therefore, that the question was properly left to the jury, whether it was not too late to return the goods, and that this rule should be discharged.

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Rule discharged.

(a) 6 Taunt. 446.

RUSSELL *against* BANGLEY.

ACTION on a policy of assurance subscribed by the defendant for 150*l*. At the trial, before *Graham* Baron, at the last *Bristol* assizes, the question was, whether, under the circumstances of the case, the plaintiff had not been paid. It appeared that the policy had been effected in *October*, 1819, by one *Savery*, a broker,

A policy delivered to an insurance broker for the purpose of settling a loss, is adjusted by the underwriter, payable at a month. The broker charges the underwriter in ac-

count for the loss, and transmits to the assured an account, in which he states himself to be debtor for the amount of the loss: and for the balance of that account the assured draws a bill upon the broker, which the latter accepts, but does not pay. The underwriter's name never having been struck off the policy, it was held that he was not discharged.

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who returned it to the assured. A loss having afterwards happened, the plaintiff delivered it to *Savery*, to get the loss adjusted. On the 15th *March* the loss was adjusted by the defendant, payable at one month. *Savery*, the broker, then made out and transmitted to the plaintiff his account current, in which he made him debtor for various premiums upon former policies, and credited him with 150*l.*, the amount of the loss upon the policy, and the balance due to the plaintiff on this account, was 133*l.* 4*s.* For that sum the plaintiff, on the 18th *March*, drew a bill at two months on *Savery*, which the latter accepted. *Savery*, at the same time, debited the defendant with the amount of this loss in his account. The policy remained in *Savery*'s hands, but the name of the defendant was not cancelled. The bill drawn by the plaintiff became due on the 21st of *May*, but was not paid, and soon afterwards *Savery* became bankrupt. It was proved, that the usage in the insurance business was for the brokers to settle with the underwriters, according to the state of the accounts between them. If the account were against the underwriter, the latter paid the amount of the loss or the balance, (after deducting the premiums) to the broker at the expiration of the month; but if the account was in his favour, then no money passed to the broker, but the latter debited the underwriter with the loss, and settled the balance of the account at the end of the year. Between the assured and the broker, the balance is either paid, or carried to the credit of the assured, at the option of the latter. At the trial the learned Judge inclined to think that the plaintiffs had, by accepting the credit of the broker, received payment of the loss in question; and he nonsuited the plaintiff, with liberty to the plaintiff to move to

to enter a verdict. A rule nisi for that purpose having been obtained in last *Michaelmas* term,

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Pell Serjt. and *Manning* now shewed cause. *Andrew v. Robinson* (a) is an authority to shew, that as soon as the broker receives credit from the underwriter for the amount of the loss, the assured may maintain money had and received against the broker. In *Wilkinson v. Clay* (b) the insurance broker had debited the underwriter with a loss, and taken his acceptance for the balance of the account between them, payable at a later date than the loss would have been payable in cash; and it was there held, that the assured might maintain money had and received against the broker, even though the acceptance was dishonored, and the broker had never received any money. These authorities shew that the broker may, under circumstances, become debtor to the assured for the loss. The present case is much stronger in favour of the underwriter, for the plaintiff here has assented to receive payment by the acceptance of the broker. When the loss happened, the broker transmitted to the plaintiff his account, and made himself debtor for the amount of the loss; and the plaintiff, by acquiescing in that account, and drawing on the broker for the balance, agrees to accept him as his debtor instead of the underwriter. By the usage of the trade the broker, who is the common agent of both parties, does not receive money from the underwriter, but transfers to the assured the debt due from him to the underwriter; and to that transfer so made, conformably to the general usage, the assured, in this case, has assented.

(a) 3 *Campb.* 173.(b) 6 *Taunt.* 110.

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Gaselee, contra, was stopped by the Court.

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against
BAYLEY.

ABBOTT C. J. The general rule of law is, that if a creditor employs an agent to receive money of a debtor, and the agent receives it, the debtor is discharged as against the principal, but if the agent, instead of receiving money, writes off money due from him to the debtor, then the latter is not discharged. In cases of insurance, usage may possibly introduce a different rule; but at all events an underwriter has never been considered discharged as against the assured, until his name has been struck off the policy. If the underwriter relies on his communication with the broker, as discharging him without actual payment of the money, he should insist that his name should be struck off the policy. If that be done, and the plaintiff then forbears to call upon him for payment within the period warranted by the usage of the trade, then the underwriter may be discharged, but otherwise he is not. The name not having been struck off in this case, I think that the plaintiff is entitled to recover.

BAYLEY. J. I am of opinion, that the verdict ought to be entered for the plaintiff. When *Russell* left the policy in the hands of *Savery*, he made him his agent, to receive the money from the underwriter. It then became the duty of the underwriter to pay *Savery* in money, so as to enable him to hand it over to the assured. In this case the defendant did not do so, but left it to the broker, to make the payment to the assured in such a way as he might think fit. In fact, he made the payment by a bill of exchange, which ultimately was not available, and therefore no money came

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came to the hands of the assured. Now, if the defendant makes the broker his agent, to pay the money over to the assured, he should inquire whether he has, in point of fact, made that payment. If the name had been taken off the policy with the consent of the assured, then, when the underwriter applied to the broker, he would have seen that, and he might then fairly suppose that there had been actual payment made by the broker to the assured. If the defendant had used due diligence, he might have learnt whether there had been that which the assured had consented to receive as payment. Here, if he had desired to look at the policy, he would have seen that that raised no presumption whatever; and if he had then asked if there was a receipt, he would have found nothing of that kind. The plaintiff, therefore, never put it in the power of *Savery* to hold out to the defendant that the money was in point of fact paid. The fact of his taking *Savery's* bill was nothing more than an agreement, to accept payment in that way if it should be ultimately available. If the defendant had meant that the money should be paid by bill, he should have sent that bill to the assured, or he should have pledged his own credit in some respect. *Savery* is in fact the agent of both parties; of the assured to receive the money, and of the underwriter to make the payment. He has not done his duty as agent for the underwriter, for he has not in fact paid the money. That being so, and the assured having done nothing to hold out to the underwriter that payment had been made, the principal, who has trusted an agent who has not performed his duty, is liable. I am, therefore, of opinion, that this rule should be made absolute.

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HOLROYD J. I am of the same opinion. The delivery of the policy to the broker to settle the loss authorises him to receive the money due to the assured on the policy. If he had received the money, and afterwards failed, the assured could not have called on the underwriter again, because he would then have paid the money to an agent duly authorised to receive it. But the delivery of the policy to the broker to obtain payment does not authorise him to settle the loss in any other way than by receiving the money. Now, in this case, the policy having been placed in the hands of the broker, an account is made out, shewing how much was due from the assured to the broker on one hand, and from the broker to the assured on the other; and in that account the broker states the amount of the loss in question to be a sum due from him to the assured. It was, however, in fact, due from the underwriter. For the balance of that account the assured drew a bill on the broker, which was accepted by the latter, but not paid in due course, and that without any default of the assured in endeavouring to obtain payment. This being so, I cannot distinguish this case from those in which it has been decided, that receiving a bill from a third person is not a satisfaction of a debt, in case the bill be not eventually paid, unless there be some default in the holder. I think, therefore, that there has not been any payment, and that the verdict should be entered for the plaintiff.

BEST J. I am of the same opinion. The broker was only authorised to receive payment in money. In this case the defendant has settled the loss with the broker, that is, the amount due to the plaintiff has been
ascer-

ascertained between them, and the broker accepted a bill for the same. Before, however, the giving of a bill of exchange by a third person can discharge an original debtor, it must be shewn that the person taking that bill agreed to accept it in full satisfaction. There is no such agreement in this case. It appears clearly that it was not understood by the plaintiff that the original debtor was to be discharged; for it appears that that has not been done which is usually done when the underwriter is discharged, viz. his name has not been struck off the policy. If that had been done, it would have furnished strong evidence that it was struck off with the plaintiff's privity. The name still appearing in the policy, I think it must be taken that the plaintiff must have accepted this bill as an additional security, and not with an intention to discharge the underwriter. That being so, I think this rule should be made absolute.

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 against
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Rule absolute.

DOE, on the Demise of THOMAS BRYAN, *against*
 CHRISTOPHER BANCKS.

EJECTMENT to recover lands and mines in the parish of *Broseley*, in the county of *Salop*. The day of demise laid in the declaration was the 18th of *April*, 1820. At the trial before *Richardson J.*, at the last Summer assizes for the county of *Salop*, it appeared in evidence, that on the 14th *December*, 1802, *Thomas Bryan*, by an indenture of lease demised to *Thomas*

A lease of coal mines reserved a royalty rent for every ton of coals raised, and contained a proviso that the lease should be void, to all intents and purposes, if the tenant should cease working at any time two

years. After the working had ceased more than two years, the lessor received rent: Held, that a tenancy from year to year was not thereby created; for the lease was not absolutely void by the cesser to work, but voidable only at the option of the lessor, and that he might avoid the lease upon any cesser to work commencing two years before the day of demise in the ejectment.

Coombe

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—
Doe, dem.
BRYAN,
against
BANCKS.

Coombe and others all the colliery, coal-work, iron, stone-work, rocks and quarries, in and under certain pieces of ground of *T. Bryan*, in the parish of *Broseley*, except trees, &c., with liberty to make pits, &c. Habendum from the 1st of *January* next for 99 years, rendering a royalty rent of 1s. 2d. for every ton of coals, and 3s. 6d. per acre for the land. The lease contained the following proviso: "Provided also, and it is mutually agreed between the parties hereto, that the aforesaid works should commence and begin within one year from the date thereof, and if the same should stop or cease working at any time two years, this lease shall be deemed void to all intents and purposes." In 1809 the lease was assigned to the defendant, and he worked the mines effectually till *May*, 1813, when he withdrew the machinery, and, in fact, abandoned them. In *May*, 1815, *May*, 1817, and *April*, 1819, he, for the purpose of preserving the lease, raised a few tons of coals of hardly any value. At *Michaelmas*, 1817, *Bryan* received rent, and gave a receipt in the following words: "Received, the 29th *September*, 1817, of Mr. *Bancks*, by the hands of Mr. *Birch*, the sum of 4l. 3s. for half a year's rent for land and pits, due this day, by me." In *March*, 1818, *Bryan* took possession of the mines; but *Bancks* brought an ejectment, and in *Trinity* term, 1819, obtained judgment by default, and a writ of possession was executed in *Bancks's* favour. It was objected, on the part of the defendant, that there was no forfeiture of the lease, as the works had never ceased for two years. Secondly, that the forfeiture had been waived by the receipt of rent on the 29th of *September*, 1817; and, thirdly, that, at any rate, by the receipt of rent since the forfeiture, a tenancy from year to year had been created, which could only be determined

mined by a notice to quit. The jury expressly found, that since 1813 the workings had been temporary, collusive, and fraudulent. *Richardson J.* thereupon directed a verdict to be entered for the lessor of the plaintiff, reserving to the defendant leave to move to enter a nonsuit on the objections made at the trial. A rule nisi for this purpose having been obtained in last *Michaelmas* term,

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BRYAN,
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BANKS.

Campbell now shewed cause. The working of the mines to preserve the lease must be bona fide, the rent depending upon the coals raised. [The Court intimated a clear opinion in favour of the lessor of the plaintiff on this point, and desired *Campbell* to proceed to the others.] Secondly, the proviso in this case is, that the lease shall be void to all intents and purposes. It cannot, therefore, be confirmed as against the landlord by the receipt of rent. In *Co. Litt. 215. a.* it is laid down "that where the estate or lease is ipso facto void by the condition or limitation, no acceptance of the rent after can make it to have a continuance: otherwise it is of an estate or lease voidable by entry." (a) And the reason for the distinction is, that the acceptance of rent cannot make a new lease when the old one is determined; but the acceptance of the rent is a sufficient declaration that it is the lessor's will to continue the lease; for he is not entitled to the rent but by the lease. *Finch v. Throckmorton* (b), and *Mulcarry v. Eyres and Others* (c), are also authorities in point. Thirdly, no tenancy from year to year was created for the rent received at *Michaelmas*,

(a) 1 *Inst.* 215. a. and see 3 *Rep.* 65. a.(b) *Cro. Elix.* 221.(c) *Cro. Car.* 511.

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—
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against
Bance.

1817, may well be considered as received under the lease. The landlord may be admitted to say, that although the lease subsisted to that time, it was forfeited before *March*, 1818, when he took possession. He may date the commencement of the two years at any time, so as to make the completion of it at any period in the interval between the receipt of the rent and the act of taking possession. This is a continuing forfeiture; and the landlord may take advantage of it at any time while it does continue.

Jervis, contra. The working of the coal-pits first ceased in *March*, 1813. In *March*, 1815, a forfeiture was complete. The lease then became void to all intents and purposes. It was void, therefore, both as to landlord and tenant. The receipt of rent subsequently to that period created a tenancy from year to year, which ought to have been determined by a notice to quit. On the other hand, if the lease was only voidable at the option of the lessor, the receipt of rent would confirm it to that period. If this be not the true construction of the lease, the consequence may be, that the landlord, by not insisting on a forfeiture in the first instance, may induce the tenant to make expensive improvements, and afterwards deprive him of the benefit arising from them.

ABBOTT C. J. The question in this case is, whether the lessor of the plaintiff, in the month of *March*, 1818, when he actually entered and took possession of the farm, had a right to do so. As the judgment obtained against the lessor of the plaintiff, in 1819, is no bar to the plaintiff recovering in this action, so neither will our judgment in favour of the lessor of the plaintiff be conclusive

clusive against the defendant, but he may in his turn bring another ejectment. I am clearly of opinion, that in *March*, 1818, the lessor of the plaintiff had a right to recover. If the defendant, the tenant of the mine, had first ceased to work on *Michaelmas-day*, 1815, the landlord would have had a right to receive the rent that became due on *Michaelmas-day*, 1817, because the cesser for two years is requisite, in order to make the lease void, and he would also have a right to enter on the day after *Michaelmas-day*, 1817; and if he had a right to enter, provided the cesser had been for two years only, terminating at *Michaelmas-day*, 1817, which is the day of the receipt of the rent, it remains to be considered, whether, if the tenant had ceased to work for six years, the lessor of the plaintiff would have had a right which he would have had on a cesser of two years. Unless the defendant can establish, first, that this lease became absolutely null and void, at the end of the first two years against both parties, so that no action whatever could be brought upon it, and unless he can also establish that the receipt of rent had the effect of creating a new tenancy from year to year, requiring notice to quit, the plaintiff is clearly entitled to recover. I am of opinion, that, notwithstanding the language of this lease, it did not become absolutely void by a cesser of two years, unless the landlord thought fit to make it so. If, indeed, it were held, that a lease thus became absolutely null and void, even where it was made to appear that there had been a continuance of the receipt of rent afterwards, the consequence might be, that when the landlord at an advanced period brought his action of covenant, he might be told that he had no right to maintain that action, on the ground that the lease had become

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BRYAN,
against
BANCROFT.

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BRYAN,
against
BANKS.

become void by forfeiture many years before. My opinion is, that the lease did not become absolutely void at the end of the first two years, unless the landlord chose to make it so. He, however, forbears to do so, and continues receiving the rent, and giving the tenant an opportunity of setting to work at the mines, which he neglects to do. I am of opinion, that the landlord had a right, as soon as he had received the rent up to *Michaelmas-day*, 1817, to enter and avail himself of the forfeiture incurred during the last two years. I think he might have done so on the very next day: at any rate, he has a right, now that there has been a continued cesser for two years previous to the ejectment brought, to enter upon it. There is no distinction between the very day after the receipt of the rent and the period of a week or month. I am of opinion, that the legal effect of this instrument is, that it is voidable only at the election of the landlord, and that he is at liberty to make the lease void at the end of any two years, during which two years there had been a continued cesser to work. In the present case, the defendant had ceased to work for the period of two years previous to the commencement of the action. I think, therefore, that the plaintiff is entitled to recover. This rule, therefore, must be discharged.

BAYLEY J. I am of opinion, that the true construction of the proviso in this lease, "that it shall be null and void to all intents and purposes upon a cesser of two years," is, that it shall be voidable only at the option of the lessor, and that it does not lie in the mouth of the lessee, who has been guilty of a wrongful act, in omitting to work in pursuance of his covenant,
to

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BANCKS.

to avail himself of that wrongful act, and to insist, that thereby the lease has become void to all intents and purposes. By the express provisions of the 13 *Eliz.* c. 10., certain ecclesiastical leases are made void, to all intents, constructions, and purposes; yet it has been frequently held, that such leases are good, during the life of the person by whom they are made. I think, therefore, that the fair construction of this lease is, that it is void only at the option of the lessor, and that the receipt of the rent on the 29th *September*, 1817, has not destroyed his right to bring this ejectment. I consider the demise as being, in substance, made in *March*, 1818, when he entered on the premises. Now if he had then brought an ejectment, he might have called a witness to prove, that from *March*, 1816, down to *March*, 1818, he had been constantly watching the pit, and that no work had been going on. That witness may not have known the pit before; and it surely would be no answer to say, that the defendant had been guilty of a previous cesser, or, in other words, that he had not worked the mine from the 1st of *March*, 1813. The effect of the receipt of rent on the 29th *September*, 1817, cannot amount to more than an acknowledgment on the part of the lessor of the plaintiff, that no forfeiture was then complete. He does not thereby admit that a forfeiture may not have been inchoate, but merely that it was not complete, so as to entitle him to bring an ejectment. I think that the landlord has it in his election to make this lease void or not; that he is not bound to exercise that election in the first instance; and that though he may waive it from time to time, he is at liberty afterwards to insist on the forfeiture in respect of sub-

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against
BANCER.

subsequent misconduct. The case of *Doe, on the Demise of Boscarren, v. Bliss* (a) is very much in point. There it was expressly held, that a lessor who has a right of re-entry reserved, on a breach of a covenant not to underlet, does not, by waiving his re-entry on one underletting, lose his right to re-enter on a subsequent underletting. And Gibbs J. is there reported to have said, "It might as well be contended, that if a landlord once knew that his premises were out of repair, and did not sue instantly, he could never after re-enter for a breach of covenant committed by their not being repaired." I am of opinion, that the receipt of the rent, in *September, 1817*, did not destroy the right of the lessor of the plaintiff to take any part of the period between *September, 1815*, and *September, 1817*, as a period in which a forfeiture was inchoate and beginning; and that if the cause of forfeiture continued, he is at liberty to add to that the subsequent period, from *September* till the *March* following, so as to complete the period of two years. For these reasons, it seems to me that the verdict was right.

HOLROYD J. I am of opinion, that the tenant cannot insist that the lease is void against the will of his landlord, and also, that the acceptance of the rent will not create a tenancy from year to year. The tenant cannot insist that his own act amounted to a forfeiture; if he could, the consequence would be, that in every instance of an action of covenant for rent brought on a lease containing a proviso, that it should be void on the non-performance of the covenants, the landlord would

(a) 4 *Tamnt.* 735.

be defeated by a tenant shewing his own default at a prior period, which made the lease void. If that be so, there is nothing to prevent the landlord claiming for the forfeiture of this lease, for a ceasing to work subsequent to the 29th *September*, 1815. That ceasing to work for two years after the 29th of *September*, 1815, would not make a forfeiture until after the expiration of the day of the 29th *September*, 1817. Now that is not inconsistent with the receipt of the rent on that day, for supposing it to be a receipt of rent under the lease, still the landlord may consistently say that the lease was forfeited on the 30th *September*, or the 1st of *October*, 1817, for two years cesser of work prior to either of those days. Although the landlord, by the receipt of the rent on the 29th *September*, 1817, may have admitted that the lease was existing on that day, yet he may avoid it on a forfeiture which became complete at a subsequent period.

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against
BANCKS.

BEST J. In construing this clause of the lease, we must look to the object which the parties had in view. The rent was to depend upon the number of tons of coals raised. In order to derive any benefit from the mine, it was the object of the landlord, by introducing this clause, to compel his tenant to work it. The clause therefore was introduced solely for the benefit of the landlord, to enable him in case of a cesser to work, to take possession of the mines, and either work them himself, or let them to some other tenant. That therefore being the object of the parties in introducing this clause, I think it will be fully answered, by holding the lease to be void at the option of the landlord. Besides, I take it to be an universal principle of law and justice, that no man can take advantage of his own wrong.

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BANKS.

Now it would be most inconsistent with that principle, to permit the defendant to protect himself against the consequences of this action, by afterwards setting up his own wrongful act at a former period. It appears to me that this was a continued forfeiture, and that the landlord had a right to take advantage of it, whenever he thought proper so to do. If the tenant be induced by the landlord's not taking advantage of the forfeiture in the first instance to make improvements, a court of equity would perhaps grant him relief. Upon the whole, I am of opinion that the rule for a new trial should be discharged.

Rule discharged.

WARD and Another, Assignees of GREAVES, a
Bankrupt, *against* WILKINSON and Another.

In trover by *A.*
against *B., C.*
is a competent
witness to prove
property in
himself.

TROVER for oil of peppermint. At the trial before Abbott C. J. at the *London* sittings after last *Michaelmas* term, the plaintiff's case was, that the bankrupt had purchased the oil of peppermint of one *Beale*, and obtained from him a delivery order on the evening of the 9th of *August*, (the act of bankruptcy having been committed on the 10th,) and that the oil had been seized by the sheriff under a fraudulent execution against the bankrupt at the suit of one *Perryman*, who had subsequently delivered it to the defendants, in payment of a debt he owed them. The defence was, that the bankrupt had fraudulently obtained possession of the oil from *Beale*, at a time when he was not in a situation to perform his contract, and, consequently, that under these circum-

circumstances no property had passed to him or his assignees. *Beale* was called as a witness to prove that the delivery order was only given by him to enable the bankrupt to take the oil home and inspect it in bulk, and that it was expressly stipulated, that the bankrupt should not sell the oil until *Beale* was paid by a good bill. The Lord Chief Justice rejected this evidence, on the ground that *Beale* was not a competent witness to prove title in himself. A rule nisi for a new trial having been obtained in last *Hilary* term,

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 against
 WILKINSON.

Marryat now shewed cause. This evidence was properly rejected, inasmuch as *Beale* had an interest in proving the property in himself. If the assignees succeed in this action, *Beale* could not recover against them; if, however, the assignees were defeated in this action, *Beale* would then be entitled to recover against the defendant.

Scarlett and *Wilde* contra. In *Rex v. The Warden of the Fleet* (a), it was held on a trial at bar, that no verdict can be given in evidence but such whereof the benefit may be mutual, that is, such as might have been given in evidence either by the plaintiff or the defendant, and Chief Baron *Gilbert* (b) lays it down, that nobody can take benefit by a verdict, who had not been prejudiced by it, had it gone contrary. Now here if *Beale* brought an action against *Wilkinson*, this verdict could not be given in evidence for him, because it is not between the same parties: and for the same reason, if an action were brought by *Beale* against

(a) *Rep. temp. Holt*, 134.(b) *Gilbert's Evidence*, p. 28.

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the assignees, this verdict, if in their favour, would not be evidence for them against *Beale*.

ABBOTT C. J. I am of opinion, upon further consideration, that I ought to have received this evidence. The true question in these cases is, whether the verdict would be evidence in favour of the witness in an action brought by him to recover the same property. Now the verdict, if in favour of the present defendant, never could be evidence for *Beale*, unless it would be evidence against him, in the event of its being in favour of the present plaintiffs. If the verdict were in favour of the plaintiffs, and *Beale* were to bring an action against them for the goods, they could not give in evidence against *Beale* the verdict obtained in the present action, because *Beale* was not a party to that suit; and if it could not be given in evidence against *Beale*, neither can it be given in evidence for him. In fact, the proving of the title in himself, in this case, does him no good, and consequently he stands indifferent as to the legal result. I think, therefore, that the testimony ought to have been received, and that this rule must be made absolute.

HOLROYD J. The rule is now perfectly established, that a person is a competent witness unless he be interested in the event of the suit. *Beale* in this case is not interested in the event of the suit, for the verdict in this action would not be evidence in an action brought by him. The case of *Nix v. Cutting* (a) is an authority in point. It was an action of trover for a horse, and

(a) 4 Taunt. 15.

the question was, whether one *Denny*, who gave evidence on the part of the defendant, was an admissible witness. He stated, that it was agreed between the plaintiff and himself that he should take the horse as a security for the payment of 15*l.* deposited by him with the plaintiff, and that the horse should be sold at the next *Woodbridge* fair, if the money was not paid by that time. The money was not paid by that time, and the witness sold the horse at *Woodbridge* fair to the defendant. A rule nisi having been obtained for a new trial, on the ground that this evidence ought not to have been received, the Court of Common Pleas confirmed the opinion of *Grose J.* at nisi prius, that the evidence was admissible, on the ground that the verdict would not be evidence in favour of the witness in any case. It seems to me that that case is expressly in point, and ought to govern the present. I think, therefore, this rule ought to be made absolute.

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against
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BEST J. concurred.

Rule absolute.

TREACHER *against* HINTON.

DECLARATION by the indorsee, against the acceptor of a bill of exchange, addressed to the defendant, at *Plymouth*, and accepted, payable at Sir *John Lubbock's* and Co., bankers, *London*. The declaration contained an averment of presentment at Sir *John Lubbock's* and Co., refusal of payment, and notice to the defendant. At the trial before *Abbott C. J.*, at the *London* sittings after last *Michaelmas* term, the at nisi prius, and the Judge directed a nonsuit, with liberty to the plaintiff to move to enter a verdict.

In an action against the acceptor of a bill payable at a banker's, it is not necessary to prove notice of non-payment to the acceptor. The Court may order a verdict to be entered for the plaintiff, where the cause was undefended to move to enter

F f 3

plaintiff

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plaintiff proved the hand-writing of the defendant, the presentment at Sir *John Lubbock's* and Co., and the refusal to pay. *Abbott* C. J. inclined to think, that since the late decision of the House of Lords, in *Rowe v. Young*, the plaintiff was bound to prove that he had given notice of non-payment to the defendant; and the cause being undefended, he nonsuited the plaintiff, with liberty for him to move to enter a verdict for the sum mentioned in the bill. A rule nisi for that purpose having been obtained in last *Hilary* term,

Wilde now shewed cause. The effect of a special acceptance is to impose on the holder of the bill the duty of giving notice to the acceptor, in case the bill be dishonoured at the place specified, and that results from the late decision of the House of Lords in *Rowe v. Young*. (a) The acceptance is nothing more than an order to the banker to pay the money, and an undertaking that the acceptor had an authority to address the bill to him. In its operation and effect it is like a draft on a banker. It is so treated by all the parties concerned. It is clearly an authority to pay; and in practice the banker does pay, and it has been considered in the nature of a draft on a banker by courts of law. *Parker v. Gordon* (b), and *Elford v. Teed* (c), are authorities to shew, that a bill accepted, payable at a banker's, must, like a check, be presented within the usual banking hours. Now, in order to charge the drawer of a check, it is necessary to give him notice of non-payment by the bankers; and there is no reason why the same rule should not apply to the case of a bill payable at a banker's. At all events, the Court, in this case, have no power to order a verdict to be entered for the plain-

(a) 2 Bro. & B.

(b) 7 East, 385.

(c) 1 M. & S. 28.

tiff. It is the province of the jury to pronounce the verdict, which they have not done in the present case; and the defendant not having consented that the nonsuit should be set aside, and a verdict entered, the Court cannot now order that to be done.

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against
HINTON.

Abraham, contra, was stopped by the Court.

ABBOTT C. J. I am of opinion that this rule ought to be made absolute. Bills of exchange, of late years, have been made payable by the acceptor, either at the houses of his friends or agents, they being expressly named in the acceptance, or at banking-houses, or at houses merely described by their number in a certain street. It is most convenient, that the same rule should be laid down, as applicable to all these cases. The most plain and simple rule to lay down is this, that the effect of any acceptance in any of these forms is a substitution of the house, banker, or other person therein mentioned, for the house or residence of the acceptor and, consequently, that the presentment at the house, or to the person named in the acceptance, is equivalent to presentment at the house of the acceptor. This rule, I think, will be equally applicable to the case of every acceptance, and will be convenient and advantageous to the public. On the other point, I have no doubt that the Court have the power, in this case, to order the verdict to be entered for the plaintiff. I have frequently adopted this practice, in undefended causes, and I know of no other certain mode of giving the defendant, in an undefended cause, the benefit of a legal objection.

BAYLEY J. I have no doubt, that, under the circumstances of this case, the Court may order a verdict to

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against
HINTON.

be entered for the plaintiff. It appears from the evidence, that it was imperative on the jury to find a verdict for the plaintiff. When the Judge, therefore, nonsuited, and stated, in the hearing of the jury, that the plaintiff should be at liberty to move to enter a verdict, and no objection was made, either by the defendant or the jury, the jury in fact consented that the verdict should be so entered, if the Court thought fit. It seems to me, therefore, that when it is entered, it becomes the verdict of the jury, as much as if it had been originally pronounced by them. It would be inconvenient, in point of practice, and most injurious to defendants, if the rule were otherwise; for then it would be the bounden duty of the Judge to direct a verdict to be given for the plaintiff, even where he entertained a doubt as to the plaintiff's right, in point of law, to recover; and, possibly, the defendant (not being present) might never be aware of the legal objection; whereas by the practice of nonsuiting, the defendant must have notice, because the plaintiff is bound to serve him with the rule nisi for entering a verdict, and he then has an opportunity of shewing cause against that rule. On the other point I have no doubt. An acceptance payable at a banker's is substantially a statement by the acceptor, that that is the place at which payment will be made by himself, his banker, or his agent; and it is the duty of the acceptor to take care that such payment is duly made. He has an opportunity, from time to time, of calling on the bankers for his account, and he may give them directions to send all bills to him as soon as they are paid, and then, by looking at such accounts, he will know whether such payments have been made or not; I think, therefore, that this rule should be made absolute,

HOLROYD

HOLROYD J. I am clearly of opinion that this is not a check ; it could not be declared upon as a check, but only as a bill of exchange accepted by the defendant. I think that the effect of this special acceptance is an engagement on the part of the acceptor to pay at the place mentioned in the bill, either by himself or his agent. That was the ground of the decision of the House of Lords, in the late case of *Rowe v. Young*, where it was held, that the holder is bound to make the presentment at the place mentioned in the acceptance. With respect to the other point, I am clearly of opinion, that, under the circumstances of this case, the Court is well warranted in ordering a verdict to be entered for the plaintiff. All the necessary proof was given to entitle the plaintiff to recover, and it was imperative on the jury to find a verdict for him. The Lord Chief Justice having a doubt on a point of law, stated, in the hearing of the jury, that there should be a nonsuit, with liberty to the plaintiff to move to enter a verdict in his favour, in case the Court should be of opinion that the doubt which he entertained was unfounded. The jury assent to that, and that being so, the case may be considered as if the jury had actually pronounced their verdict in favour of the plaintiff, and the Judge had then interposed and said that he had a doubt on a point of law, and that the plaintiff should be nonsuited ; and if that nonsuit should be set aside, the verdict should stand. I think, therefore, that the verdict ultimately entered for the plaintiff is to be considered as the act of the jury, and not that of the Judge.

BEST J. concurred.

1821.

TRACHER
against
HINTON.

1821

ALLEN, Assignee of JOHNSON, a Bankrupt,
against CANNON and Others.

A person living in the *Isle of Man*, coming from time to time to *England*, and buying goods which are afterwards sold in the *Isle of Man*, is a trader against whom a commission of bankrupt may issue in *England*, although he in fact never sold any goods in *England*.

TROVER by the plaintiff, as assignee of *Johnson*, a bankrupt. At the trial before *Park J.*, at the last Summer assizes for the county of *Lancaster*, it appeared that the bankrupt had for several years carried on the business of a linen-draper in the *Isle of Man*, and had from time to time come over to *England* and purchased goods, which he afterwards sold, in the course of his trade, in the *Isle of Man*; but he had never sold any goods in *England*. It was objected, that in order to make him a trading person within the meaning of the bankrupt laws, there ought to have been both a buying and selling in *England*. The learned Judge over-ruled this objection, and a verdict was found for the plaintiff. A rule nisi for a new trial having been obtained in last *Michaelmas* term, upon the objection taken at the trial, the Court now called upon

Hullock Serjt. and *Littledale*, to support the rule. The bankrupt was not a trader within the meaning of the statute 1 *Jac.* 1. c. 15., for he only bought goods in *England*; whereas, to make him a trader subject to the bankrupt laws, he ought to have bought and sold in *England*. They cited *Williams v. Nunn.* (a)

ABBOTT C. J. I am of opinion that a person living in the *Isle of Man*, coming from time to time to *Eng-*

(a) 1 *Taunt.* 270.

land,

land, and purchasing goods to be sent to the *Isle of Man*, and which are there sold, is a person using the trade of merchandise within the meaning of the statute of 13 *Eliz.* c. 7. and 1 *Jac.* 1. c. 15. In *Ex parte Smith* (a), the bankrupt was never resident in *England*, nor had ever traded in *England*, and he had come over on purpose to get the commission taken out against him; yet Lord *Hardwicke* held him to be a trader subject to the bankrupt laws. In *Bird v. Sedgwick* (b), and *Alexander v. Vaughan* (c), it was held that a person trading to *England*, though not a resident trader in *England*, is an object of the bankrupt laws, if he commits an act of bankruptcy here. Upon the authority of those cases, and upon the words of the statute, I have no doubt that the bankrupt was a trader; and I, therefore, think that this rule should be discharged.

1821.

 ALLEN
against
CANNON.

Rule discharged.

See *Dodsworth v. Anderson*, *Sir T. Raym.* 375.(a) *Cowper*, 402.(b) *Salk.* 110.(c) *Cowper*, 398.

CHARLES INNELL and ELIZABETH, his Wife,
against NEWMAN and Another.

Thursday,
May 10th.

JERVIS, in last *Michaelmas* term, had obtained a rule calling upon the defendants to shew cause why the plea puis darrain continuance, put in by them at the

Husband and wife lived separate under a deed, by which he stipulated that his wife

should enjoy, as her separate and distinct property, all effects, &c. which she might acquire, or which by any gift, grant, &c. or representation, she, or he in her right, might be entitled to; and that he would not do any act to impede the operation of that deed, but would ratify all lawful or equitable proceedings to be brought in his or their names, for recovering such real and personal estates; and the wife having, as executrix of *R. M.*, commenced an action on a promissory note against defendants in the names of her husband and herself, the husband released the debt, which release was pleaded puis darrain continuance. The Court, on application, ordered such plea to be taken off the record, and the release to be given up to be cancelled.

trial

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INNELL
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trial of this cause, should not be taken off the record, and the release therein mentioned be delivered up to be cancelled. It appeared upon the affidavits that the action had been commenced by *Elizabeth Innell*, the wife of the plaintiff, as executrix of *Richard Moss*, to recover a sum of money due upon a promissory note; and that the cause being at issue, the defendants, at the last assizes for the county of *Oxford*, on the 13th of *July*, pleaded, puis darrain continuance, a release executed on the 3d day of *July* by *Charles Innell*, the plaintiff. The affidavits then stated that the action was commenced and prosecuted for the sole benefit of *Elizabeth Innell*, and that on *December 7th*, 1798, a regular deed of separation was entered into between *Charles Innell* and his wife, whereby he agreed to allow her to enjoy, as her distinct and separate estate and property, all such effects whatsoever which she might thereafter purchase or acquire, or which by any gift, grant, limitation, devise, bequest, descent, or representation, she or the said *Charles Innell*, his heirs, executors, or administrators, in her right, should or might be entitled to; and that these should be enjoyed, without any interruption, by the said *Charles Innell*; and that he would not, at any time, do any act to impede the operation of that deed, but would, at all times, allow of, ratify, and confirm all lawful and equitable proceedings to be brought or prosecuted in his or their name or names, with or without the said *Elizabeth* his wife, for recovering and obtaining such real and personal estates. The affidavits further stated, that from the execution of the deed the parties had constantly lived separate; and that the release was, as they verily believed, collusively obtained.

W. E.

W. E. Taunton and *G. R. Cross* shewed cause, and contended that the deed of separation in this cause was wholly illegal; and that the husband might at any time resume his marital rights, notwithstanding its provisions; and, besides, even if that were not so, the Court would hardly enforce the provisions of such a deed by a summary proceeding. Here, too, the husband may be liable for the debts of the testator, in case of a devastation; and it therefore could never be in the contemplation of the parties, that the wife should receive the money due to the testator. In *Jenkins Rep.* 79. it is laid down, that the husband, by his grant, may dispose of the goods and chattels which his wife has in her own right, or as executrix. The object of this deed of separation was only to secure to the wife all the property which she might have, or of which she might be entitled to the beneficial enjoyment; but it was never intended to include property which she had solely in her representative capacity.

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against
NEWMAN.

Jervis and *Campbell*, contra, were stopped by the Court.

ABBOTT C. J. Whilst the husband continues to relinquish his marital rights, it would be contrary both to equity and justice, if we were to allow him, in direct violation of the contract which he has made, to execute a release of this sort, and thereby to render the suit commenced by his wife in her character of executrix utterly unavailing. It is not necessary for us to decide as to the right of the husband to receive the money, when recovered by the present action. All that we do, on the present occasion, is to say that he shall not be allowed

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against
NEWMAN.

allowed in this manner to prevent the suit from proceeding. I am therefore of opinion that this rule ought to be made absolute.

BAYLEY J. I am of the same opinion. The wife in this case is bound, as executrix, to act for the general benefit of all persons interested under the will of the testator; and the husband ought not to be permitted to prevent this by a wrongful act, which would amount to a devastavit on his part. He is not to release the debt without sufficient compensation, but ought to suffer the suit to go on, to ascertain the amount of the debt. He may, perhaps, be entitled to intercept the money, when it is ascertained upon a trial how much is due; but he ought not to be allowed in this manner to prevent any trial from taking place. I think, therefore, that this plea ought not to stand.

HOLROYD J. I think that this release ought not to be allowed to be available to the defendants, being given under such circumstances, and in the progress of the cause. I do not agree in the construction which has been put on the deed in the course of the argument; it seems to me to extend to property claimed by the wife in her representative capacity, and I think that this release is clearly in fraud of the deed of separation. Here, too, the husband is only named as plaintiff for conformity, and he ought not to be allowed to release the debt; for to do so would be a fraud upon the persons having an interest under the will of the testator.

BEST J. This action is brought on the faith of the stipulation contained in the deed of separation; and
I think

I think that the husband ought not, under such circumstances, to be allowed to release the debt, and so altogether to defeat the action.

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INNELL
against
NEWMAN.

Rule absolute. (a)

(a) See *Legh v. Legh*, 1 Bos. & Pul. 447.

CAMPBELL and Others *against* INNES.

Friday,
May 11th.

ASSUMPSIT on a policy of insurance, dated 30th July, 1812, upon the ship *Mars* and her cargo, from *London* to *Norfolk*, in *Virginia*, and from thence to *Wilmington*, in *North Carolina*, at a premium of six guineas per cent., *against all risks, American capture, or seizure included*. The declaration averred the interest in Messrs. *Levy* and *Gomez*, and stated a loss, by the ship being seized, detained, and carried away, by certain persons unknown to the plaintiffs, to wit, by certain enemies of our lord the king. Plea, general issue. At the trial, before *Abbott C. J.*, at the *Guildhall* sittings after the last *Hilary* term, it appeared, that the ship and goods in question were the property of Messrs. *Levy* and *Gomez*, who were *American* subjects. The ship sailed on her voyage, laden with *British* goods, on the 22d July, 1812; and upon her arrival at *Norfolk*, in *Virginia*, the ship and cargo were seized by the collector of the customs for that port, and immediately prosecuted by the *American* government, as being forfeited for a breach of the non-importation act. The assured, in consequence, immediately abandoned the ship to the underwriters. It appeared, also, that war was declared by

Upon a policy effected (after the declaration of war by *America*, but before it was known in *England*), in which it was not stated in the policy, nor communicated to the underwriter, that the assured was an *American* subject, and the loss happened in consequence of a seizure by the *American* government for a forfeiture for the breach of their non-importation act: Held, that the action could not be maintained, even after the war had terminated.

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 CAMPBELL
 against
 INNES.

by the *American* government, in *July*, 1812, before the ship sailed from *England*, but that circumstance was not known in *England* till after her departure. *Abbott* C. J. was of opinion, at the trial, that as the ship was seized by the *American* government, on account of the war with *America*, and as the assured was an *American* subject, which circumstance was not stated on the face of the policy, and did not appear to be known to the underwriter when he subscribed the policy, the plaintiffs were not entitled to recover. He therefore directed a nonsuit. And now

Scarlett moved for a new trial, and contended, that here it being expressly stipulated, that the insurance should be against all risks, *American* capture, or seizure included, there was no objection to the plaintiffs' recovering now; the war with *America* being at an end. The only question is, whether it be lawful for an underwriter to contract to insure an *American* subject against the acts of his own government, and there is no case which says he may not do so by a special contract. Here it is expressly included in the risk; and upon grounds of public policy there is no objection to the allowance of such insurances. The case of *Conway v. Gray* (a) may be cited to the contrary; but the authority of that case has been much doubted. In *Simeon v. Bazett* (b), Lord *Ellenborough* lays it down, that "the exclusion of risk occasioned by the act of the assured's own government is only an implied exclusion from the reason and fitness of the thing, which may be rebutted by circumstances;" and he adds, in another place, that

(a) 10 *East*, 556.(b) 2 *M. & S.* 99.

"there

“there is no doubt that an insurance upon an *American* ship against *American* embargo might be good, notwithstanding the act of embargo might be considered as an act of the party's own government who effected the insurance. For not only an insurance against the act of his own government but even against his own act might be good, if the underwriter was disposed to enter into so hazardous a risk.” Here there is an express stipulation introduced into the policy, and the contract was, no doubt, made with a view to the very risk which afterwards occasioned the loss.

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 against
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ABBOTT C. J. In this case, the policy did not shew that the property belonged to an *American* subject, nor did it appear at the trial that the underwriter was acquainted with that fact. Now an *American* subject, to whom a ship and goods are consigned in *America*, if he knows that he is insured against a loss of this description, may not only omit to take proper means for preventing such loss, but may possibly facilitate it by giving information to his own government upon the subject. I think that that is a risk which the underwriter ought to know before he subscribes the policy. I thought, at the trial, that, as it did not appear by the policy, and was not communicated to the underwriter in this case, that this property belonged to an *American* subject, the plaintiffs were not entitled to recover; I am of the same opinion still. This rule must, therefore, be refused.

BAYLEY J. In *Simeon v. Bazett*, the underwriter was fully acquainted with all the circumstances, and it was distinctly in the contemplation of both parties there to insure against the act of the government of the assured.

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against
INNES.

It was upon that ground that the underwriter was held to be liable. But in this case it does not appear that the underwriter knew the ship and goods to be *American* property. Now that makes a material difference in his risk; for, if the property be *British* owned, of course the owner will do all in his power to prevent the risk from occurring; but if it be *American* owned, he may, if he be secure of payment by the underwriter, lend himself to the purposes of his own government, and assist them in obtaining possession of the property insured. As it does not, therefore, appear distinctly that this was a risk within the contemplation of the underwriter, at the time he subscribed the policy, I think that the nonsuit was right.

HOLROYD and BEST Justices concurred.

Rule refused.

Friday,
May 11th.

CAMPBELL and Others, Executors of DONALD-
SON, *against* INNES.

The importa-
tion of goods
from *America*,
in a vessel *Ame-*
rican built,
though owned
by *British* sub-
jects, is not le-
galized by
49 G. 3. c. 59.

ASSUMPSIT on a policy of insurance on the ship *Manhattan* and cargo, from *Virginia* to *Great Britain*. Plea, general issue. At the trial at the last sittings at *Guildhall*, before *Abbott C. J.*, it appeared that the ship was built in *America*, but was the property of *Messrs. Osborne and Co.*, who were *British* subjects, and by them was chartered for this voyage to *Donaldson*, who was also a *British* subject. The cargo consisted of timber, the produce of the United States. Upon this it was objected, that the voyage was illegal, being in violation

violation of the navigation laws. The learned Judge was of this opinion, and directed a nonsuit. And now

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 CAMPBELL
against
INNES.

Scarlett moved, by leave, to enter a verdict for the plaintiff. It is quite clear that if this had been an *American* ship, and owned by *Americans*, the importation would have been legal. For, by 49 G. 3. c. 59., an importation of *American* goods in *American* vessels is permitted, on payment of the like duties, as if imported in ships not *British* built. Then the circumstance that this vessel is *British* owned cannot make a difference; for the case of *Long v. Duff*(a) shews, that the policy of the legislature in such cases is not to prevent *British* subjects from employing foreign ships in neutral trade in as ample a manner as they can be employed by aliens.

ABBOTT C. J. I think the nonsuit right. The difficulty is this: the importation is not legalised by 49 G. 3. c. 59., because that act is confined to ships *American* owned, and here the owners of this ship were *British* subjects. Nor can the importation be legal as being in a *British* ship, because the register acts prevent this vessel, being *American* built, from being so considered. The case of *Long v. Duff* is very distinguishable. There the question turned on the words of the convoy act, and it was held that a foreign-built ship, *British* owned, was not required to be registered. But that case contains no decision on the point, whether an importation of goods in a vessel of that description would, in a case like this, be legal.

Rule refused.

(a) 2 B. & P. 209.

1821.

Saturday,
May 12th.

HETHERINGTON and Another *against* VANE,
Bart., and Others.

Where the plaintiff being possessed of house and land in *E.* had for 60 years exercised rights of common in *W.*; but it appeared that this was done near the boundary of the two commons of *W.* and *E.*, which lay open and uninclosed adjacent to each other; and it also appeared that the parties exercising the right did not, at the time, know the exact boundary, and that plaintiff had on a previous inclosure of the *E.* common obtained an allotment there in respect of his estate :
Held, that the Judge was right in leaving it to the jury to say, whether the evidence was referable to an exercise of the right in *E.* and a mistake of the boundary, or to an exercise of the right in *W.*

THIS was a feigned issue to try the right of the plaintiff to an allotment of common in the manor of *Wythop*, in the parish of *Brigham*, in the county of *Cumberland*. The claim was, that plaintiffs, as owners and proprietors of lands and tenements in the township of *Embleton*, were entitled to right of common of pasture within the manor of *Wythop*. At the trial at the last *Carlisle* assizes, before *Best J.*, it appeared, that the commons of *Wythop* and *Embleton* formerly lay open and uninclosed, adjacent to each other, and that the boundaries between them were not at that time distinctly ascertained, nor until about seven years ago, when the boundary was settled in consequence of an action between the Earl of *Egremont* and Sir *Frederick Vane*. The plaintiffs were proprietors of a house and land in *Embleton*; and it was distinctly proved, that they and their predecessors had, for 60 years past, heafed their sheep and exercised other rights of common, in places which, on the settlement of the boundary, proved to be on the *Wythop* side of it. It was also proved, that the proprietors of the estate had most commonly washed their sheep at a brook in *Wythop*, but occasionally also in one at *Embleton*. It appeared, however, that at the time these acts were done, the parties doing them were wholly ignorant of the exact boundary, and that the plaintiffs had on a previous inclosure of the *Embleton* common applied for and received an allotment in respect of this estate. The learned Judge left it to the jury to say
whether

whether this evidence was referable to an exercise of a right of common within *Embleton*, and a mistake as to the exact boundary, or whether it was to be considered as an adverse enjoyment in *Wythop*, with the knowledge of the commoners there, and acquiesced in by them. The jury found a verdict for the defendants. *Scarlett* moved for a new trial, on the ground that this was a misdirection on the part of the learned Judge. The rights were in fact exercised within the manor of *Wythop*, and that for a long period of time; and the parties must be taken to be cognizant of their own boundaries, and to have acquiesced. No doubt can be entertained that a right of common, in respect of a tenement not within the manor, may be acquired by usage. And he referred to a case tried before *Bayley J.* at *Carlisle*, where a different rule had prevailed.

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HETHERINGTON
against
VANE.

But the Court were of opinion, that the learned Judge had in this case correctly left the question to the jury, and that the jury had come to a right conclusion. And *Bayley J.* added, that in the case before him there was not any dispute as to the boundary, and that the question was not, as here, to which of two commons the exercise of the right was applicable.

Rule refused.

1821.

Saturday,
May 12th.

The KING *against* HUNT.

Upon the trial of an information for a libel only ten special jurymen appeared, and two talesmen were sworn on the jury. It is no ground for a new trial that two of the non-attending special jurymen named in the pannel had not been summoned, though it appeared that this fact was unknown to the defendant until after the trial.

THIS was an information by the Attorney-General against the defendant, for a libel. At the trial, at the last sittings at *Westminster*, before *Abbott C. J.*, when the case was called on, only ten of the special jury attended. Two talesmen were accordingly sworn, and the defendant was convicted. And now

Denman moved for a new trial, upon the affidavits of two of the special jurymen, who had not attended, stating, that they had not been summoned, and also on the affidavits of the defendant and his attorney, that they were wholly ignorant of that fact till after the trial was over; and he contended, that it was absolutely necessary that all should be summoned; for if two may be omitted, so may any other number; and so a selection may be made of particular persons to try the cause. It may be said, that for this the sheriff is punishable, but that is no advantage to a defendant who suffers by his improper conduct. But the act of parliament is imperative, for it requires all to be summoned. The trial is altogether wrong in consequence of this omission, and the defendant is entitled to a new trial. He referred to *Hill v. Yates* (a), *Parker v. Thoroton* (b), and *Dovey v. Hobson*. (c)

ABBOTT C. J. No case has been cited which is a direct authority on this question, so as to form a ground

(a) 12 *East*, 229.

(b) *Str.* 640. 2 *Ld. Raym.* 1410.

(c) 2 *Marsh.* 154.

for

for our decision; we must, therefore, look to the principle on which this application is founded. There has, in this case, been an omission to summon two of the special jurymen. The Court is not without proof to suspect any fraud on the part of its officers. It is not suggested, in this case, that the omission has been in consequence of collusion with any other person. If, then, on these affidavits, we were to grant a rule, we should intimate it to be our opinion, that in every case which may be tried, whether civil or criminal, if the party against whom the verdict passes chuses to apply, he will be entitled, as of right, to a new trial, in case he shews to the Court that any one jurymen has not been duly summoned to attend. This would be going a great deal too far. I think, therefore, that we ought not to grant this rule.

BAYLEY J. I am of the same opinion. If we were to accede to this application, it would be equally competent to the crown, in case of an acquittal, to have a new trial, as of right; and, therefore, our granting a rule in this case would tend to deprive defendants of the protection which the law at present gives to them; and this would apply to all cases, criminal as well as civil. It would surely be a monstrous proposition to contend, that, after an important question has been determined at nisi prius, the losing party might have a new trial, because the sheriff had omitted to summon one common jurymen out of the whole pannel. It is argued, that if so, the sheriff might omit to summon all the special jurymen but one. But if such a case were to occur, the Court would have no difficulty; for it is clearly competent to them, in their discretion, to

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grant a new trial. This is not an application of that sort; but if it were, I should be of opinion, that as there is no reason to think the jury wrong in their verdict, the Court ought not to interfere.

HOLROYD J. It does not appear, upon these affidavits, that any reason is suggested why the sheriff omitted to summon these two jurymen, or that it was done in consequence of any improper practice. We cannot, in the absence of proof, presume that any thing has been done corruptly. If that were so, still I think that this could not be considered as a mis-trial. If it could, great mischief, as it seems to me, would follow. In crown cases, all the acquittals would be void, and the parties might be tried again; but I think that the trial cannot so be treated as a nullity; and, as there is no other ground for the present application, I am of opinion that there should be no rule.

BEST J. It is distinctly stated, in *Dovey v. Hobson*, by Lord Chief Justice Gibbs, that applications of this sort must be to the discretion of the Court, and that they will, if justice requires it, accede to them. From any other way of considering the question, great mischief would ensue. In cases of felony or treason, where a party has been acquitted, it would follow, that the crown, on proving an omission by the sheriff, to summon one jurymen, might try the case a second time. Taking it to be an application to our discretion, is it shewn that any injustice has been done? The true rule is this, if the officer has not done his duty, he is to be punished for it; and if his omission has actually produced prejudice to the party, then it is in the discretion

cretion of the Court to prevent injustice being done, by granting a new trial. In this case, the omission is not shewn to have been prejudicial to this defendant; and therefore I think the rule ought to be refused.

1821.

—
The King
against
Hunt.

Rule refused.

DOE, on the Demise of LLOYD and Another,
against DEAKIN and Another.

Saturday,
May 12th.

EJECTMENT for certain premises, situate at *Trewillan*, in the county of *Salop*. Plea, general issue. The demise was laid in the year 1818. At the trial, at the last assizes for the county of *Salop*, before *Garrow B.*, it became necessary, in order to establish the case for the lessors of the plaintiff, to prove the death of *Thomas Tannatt*, who had been tenant for life of the premises. It appeared that he was born in *February*, 1759, and had been a wanderer during the greater part of his life, having been absent from his relations from 1787 to 1804. In 1804 he returned, and having remained a short time, went away again. Since that time he had not been seen in the neighbourhood. These facts were deposed to by a person who resided near the spot; but no one of the family was called as a witness. The learned Judge directed the jury that this was *primâ facie* evidence from which they might presume *Tannatt's* death, and the jury accordingly found a verdict for the lessor's of the plaintiff.

The fact of a tenant for life not having been seen or heard of for fourteen years by a person residing near the estate, although not a member of his family, is *primâ facie* evidence of the death of the tenant for life.

Pearson now moved for a new trial, and contended, that this was not even *primâ facie* evidence. It may be admitted

1821.

—
Doe, dem.
LLOYD,
against
DEAKIN.

mitted that an absence for fourteen years, where the individual has not been heard of during all the time, may furnish a presumption of death; but that must be with reference to the particular circumstances of each case, and the persons proving it. If any of the relations had been called, and had proved these facts, it might have been different; but here it is the evidence of a mere stranger, residing in the neighbourhood. All that it it proves is, therefore, a mere absence from the particular place for fourteen years; but no presumption of death arises from that circumstance alone. Here, too, *Tannatt* was only fifty-nine years of age at the time of the demise.

Per Curiam. The evidence unanswered was sufficient to found a presumption of *Tannatt's* death. And although the demise was laid in 1818, yet, in making the presumption, the jury might properly take into consideration the additional fact, that, up to the time of the trial in 1821, he had not been seen in the neighbourhood where this property was situate, to which, if he had been alive, he would have been entitled. In *Doe v. Jesson* (a) Lord *Ellenborough* states, that the presumption of the duration of life with respect to persons of whom no account can be given ends at the expiration of seven years from the time when they were last known to be living. The probability here is, that as he was entitled to this property, he would come into the neighbourhood to claim it. If any of the family had heard of him since 1804, they might be called to rebut the presumption. And if *Tannatt* be still alive, he may recover the possession from the lessors of the plaintiff. This rule must, therefore, be refused.

(a) 6 *East*, 85.

Rule refused,

1821.

PHILLIPS *against* SHAW.Monday,
May 14th.

ASSUMPSIT. The declaration stated, that one *Thomas Pinnock* had been sued by *Daniel Page* in an action of assumpsit for a debt, and that whilst such action was depending, in consideration that plaintiff would become bail for *Pinnock*, defendant undertook to indemnify him. That plaintiff accordingly became bail for *Pinnock* jointly with defendant, and on 24th *June*, 1816, duly entered into a recognizance of bail, whereby they consented that the damages should be levied on them, in case *Pinnock* did not pay them, or render himself to custody. It then stated, that such proceedings were afterwards had in the said action, that said *Daniel Page* afterwards, to wit, in *Michaelmas* term 58 *Geo.* 3., in the Court of King's Bench, recovered and obtained judgment in the said action against *Thomas Pinnock* for a large sum of money, as in and by the record of the said judgment still remaining in King's Bench will appear. It then set out an action commenced by *Page* against plaintiff, upon the recognizance of bail, by which plaintiff was damnified: breach that defendant had not indemnified him. Plea, general issue. At the trial before *Abbott C. J.*, at the last *Guildhall* sittings, it appeared, on the production of the office-copy of the record, in *Page v. Pinnock*, that the judgment in that case was obtained in *Hilary* term 58 *Geo.* 3., whereupon it was objected, that this was a fatal variance from the statement in the declaration. The learned Judge, however, over-ruled the objection, and the plaintiff obtained a verdict. And now

In assumpsit for not indemnifying plaintiff in consequence of his having become bail for *A.* in an action at the suit of *B.*, it was stated that *B.*, in *Michaelmas* term, 58 *G. 3.*, recovered against plaintiff. The judgment given in evidence was in *Hilary* term: Held, that this was no variance, inasmuch as this was not matter of description, but an allegation in substance that the judgment had been obtained before the commencement of the action.

F. Pollock

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PHILLIPS
against
SHAW.

F. Pollock moved, by leave, to enter a nonsuit. This was a fatal variance. This is in fact part of the description of the record. *Purcell v. Macnamara* (a) is distinguishable from this case. There it was held, that the acquittal might be stated either on the day on which it actually took place, or on the first day of the sittings at which the indictment was tried. Here the question is, whether as the parties profess to state the judgment, they must not describe it correctly. In actions upon bills of exchange, if the day of the date, or that of any instalment, be set out in the declaration incorrectly, the variance is fatal, *Wells v. Girling*. (b) For there the date is part of the description of the instrument.

ABBOTT C. J. I cannot distinguish this case from *Purcell v. Macnamara*, which was decided after much consideration. There the allegation in the declaration was, that the plaintiff had on a certain day been acquitted. Now, that fact could only be proved by the production of the record of acquittal. When that was produced, it appeared that the acquittal had taken place not on the day stated in the declaration. But the Court there held it sufficient. For the allegation in the declaration being of a substantial matter, and not being a description of the record of acquittal, was well supported by the proof. Here the substantial matter is, that before the present action was brought a judgment had been recovered by *Page*; and it was perfectly immaterial at what particular time that judgment was obtained. I think, therefore, that this was not a fatal variance.

Rule refused.

(a) 9 East, 157.

(b) 3 Bayly Moore, 79.

1821.

SKINNER and Others *against* STOCKS.Monday,
May 14th.

ASSUMPSIT for not accepting, pursuant to contract, a quantity of whale-oil. Plea, general issue. At the trial, at the last assizes for the county of *York*, before *Bayley* J., it appeared that the plaintiffs were joint part-owners of a vessel employed in the whale-fishery, and the action was brought to recover the price of some whale-oil sold to the defendants. The contract had been made by *Skinner* alone, and the defendant had no knowledge at the time that any other persons were interested in the transaction. *Brougham*, at the trial, objected that, under these circumstances, the action could not be maintained by the present plaintiffs, because, if so, the defendant might be deprived of his right of set-off. For he cannot set off a separate debt of *Skinner* against the present demand. *Lloyd v. Archbold*. (a) The learned Judge at the trial over-ruled the objection, and the plaintiffs had a verdict.

The joint-owners of a vessel engaged in the whale-fishery may sue a purchaser for the price of whale-oil, although the contract of sale were made by one of the part-owners, and the purchaser did not know that other persons had any interest in the transaction.

Brougham now renewed his objection, and moved for a nonsuit, by leave from the learned Judge.

Per Curiam. The action may be maintained either in the name of the person with whom the contract was actually made, or in the name of the parties really interested. This is continually done in cases of policies of insurance. If the introduction of these names make any difference in fact to the defendant, by affecting his

(a) 2 Taunt. 324.

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 SKINNER
against
 STOCKS.

right of set-off, he may perhaps apply to the Court for relief. But the statutes of set-off do not prevent the action from being maintainable in the names of all the parties interested.

Rule refused.

Monday,
May 14th.

The Mayor and Commonalty of the City of
 YORK *against* WELBANK.

A custom that none but a freeman, or the widow or partner of a freeman, should sell by retail in a city, or the suburbs, is valid in law.

ACTION upon the case. The declaration, after setting out letters patent of the 19 *Rich.* 2. and 5 *Jac.* 1., incorporating the plaintiffs by the name of "The Mayor and Commonalty of the City of *York*," stated the following custom: "And whereas, also, within the said city there now is, and from time whereof the memory of man is not to the contrary, there hath been a certain ancient and laudable custom, there used, obtained, and approved, viz. that no person, not being free of the said city of *York*, other than and except the widow or partner in trade of a freeman of the said city, should or might, or shall or may, or ought to sell or put up to sale any wares or merchandises within the said city, or the suburbs, &c., by retail, or keep any inward or open shop, or other inward place or room, for shew, sale, or putting to sale, by retail, of any wares or merchandises within the same." The declaration then stated, that the defendant had sold divers wares and merchandises, to wit, &c., by retail, and had kept a shop, &c., contrary to the form and effect of this said custom, he not being free of the said city, nor a partner in trade of any freeman, nor having any right so to do. Plea, general issue.

issue. A verdict having been found, upon the facts of the case, for the plaintiffs, at the last assizes for the county of *York*, before *Bayley J.*,

1821.

The Mayor of
York
against
WELBANK.

Hullock Serjt. now moved for a rule nisi for arresting the judgment. In this case the custom laid in the declaration operates in restraint of trade, and is, therefore, bad in point of law. In *The Mayor of Winchester v. Wilks (a)*, which was an action upon the case for using the trade of a woollen-draper contrary to the custom of *Winchester*, which was similar to the custom here laid, *Holt C. J.* said, that it was a point not determined whether such a custom be good, though many corporations pretended to it; and he added, that some corporations pretended to a right by custom to exclude foreigners; but he thought they could not support it. In the report of the case by Lord *Raymond*, Lord *Holt* is stated to have distinguished *Waganor's case (b)*, on the ground that that case was upon the customs of the city of *London*, which are confirmed by act of parliament. In *The Gunmakers' Company v. Fell (c)*, Lord *C. J. Willes* lays it down as a rule, that all general restraints of trade are bad. No doubt there are some exceptions to this, as if there be a good consideration given to the person restrained, or if such restraint appear to be of manifest benefit to the public. But in this case no such thing exists, for there is no good consideration given to the defendant, nor is the restraint at all for the benefit of the public. This custom is, therefore, bad, and the judgment ought to be arrested.

(a) 6 Mod. 21. S. C. 2 Ld. Raym. 1129.

(b) 8 Co.

(c) Willes, 388.

1821.

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The Mayor of
YORK
against
WELSHAM.

ABBOTT C. J. Since the decision referred to, of *The Mayor of Winchester v. Wilks*, the case of *Woolley v. Idle* (a) has occurred, which was a stronger case than the present. There it was held, that such a custom as the one stated in this declaration was valid in law. I am, therefore, clearly of opinion that there is no ground for arresting the present judgment.

Rule refused.

(a) 4 Burr. 1951.

Tuesday,
May 15th.

JOHNSON and Others *against* BAKER.

Before the execution of a composition-deed, it was agreed, in the presence of the surety for the payment of the composition, that it should be void unless all the creditors executed it. The surety, at the same interview, afterwards executed the deed in the ordinary way, without saying any thing at the time of execution: The deed was then delivered to one of the creditors, in order that he might get it executed by the rest of the creditors: Held, that this was to be considered a delivery of the deed as an escrow, and that all the creditors not having executed it, the surety was not bound.

COVENANT. The declaration stated a deed between *Richard Bulpin*, of the first part; *William Porter* and the defendant, of the second part; *George Colman* and *Edward Palmer*, of the third part; and the plaintiffs and certain other persons, creditors of *Richard Bulpin*, of the fourth part; which recited that *R. B.* then carried on the business of a linen-draper, and was justly indebted to the persons named parties of the fourth part, in the several sums of money set opposite to their names at the foot of the deed; and that he being unable to pay them in full, it had been agreed to pay 12s. in the pound, in full discharge, to be secured as to 7s., part of such 12s. in the pound, by bills drawn upon and accepted by *William Porter* and the defendant; and as to 5s. in the pound, by bills accepted by *Colman* and *Palmer*. It then set out a covenant by the defendant, to pay the said sum of 7s. in the pound at or upon the 4th day of *April*. Breach, that defendant

did

did not pay, pursuant to his covenants, the sum of 7s. in the pound, on the debt of *Bulpin*, to the plaintiffs. The defendant, after craving oyer of the deed, pleaded, first, non est factum; secondly, that the deed was delivered as an escrow, and on condition that the same should not be delivered to the plaintiffs, but be utterly void and of no effect, unless certain creditors of the said *R. B.*, and amongs others, certain persons carrying on trade under the firm of *Cooper Brothers*, being creditors of *R. B.*, should sign the said indenture. It then averred, that this condition had not been complied with: Et sic non est factum. Issues having been taken thereon, it appeared at the trial, before *Abbott C. J.*, at the last sittings at *Guildhall*, on the examination of *Edward Symes*, the defendant's attorney, who was the subscribing witness to the deed, that at the meeting at which the deed was executed by the defendant, there was a conversation respecting the difficulty which might arise, in case all *Bulpin's* creditors did not execute the deed, when it was stated that the deed should be void, unless all the creditors executed it. At this conversation the plaintiffs were not present and the defendant subsequently, but at the same interview, executed the deed in the ordinary way, and without saying any thing at the time of the execution. The deed was delivered to *Burnell*, one of the creditors, who was to get it executed by the other parties. *Abbott C. J.*, at the trial, thought that the condition previously expressed, although not introduced into the act of delivery, was sufficient to make this a delivery of the deed, as an escrow; and as it appeared that the condition had not been complied with, he held that the plaintiffs were not entitled to recover, and directed a nonsuit.

1821.

 JOHNSON
against
BAKER.

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Marryat, on a former day, moved to set aside the non-suit. This is a delivery by the defendant, as his deed, and not as an escrow. In *Sheppard's Touchstone*, p. 56., the delivery of a deed as an escrow is said to be "where one doth make and seal a deed, and deliver it unto a stranger, until certain conditions be performed, and then to be delivered to the party." But he adds two cautions: "First, that the words used in the delivery be apt and proper; second, that it be delivered to a stranger, and one who is no party to it." Here neither of these requisites have been complied with; for the deed has been delivered without apt and proper words at the time of delivery, and the delivery was not to a stranger, but to a party to the deed. In *Com. Dig.*, tit. *Fait.*, A. 3., it is laid down, that if it be delivered, as his deed, to a stranger, to be delivered to the party on performance of a condition, it shall be his deed presently; and if the party obtains it, he may sue before the condition performed. That is, therefore, an express authority in point.

Cur. adv. vult.

Per Curiam. We are of opinion, in this case, that there must be no rule granted. The conversation which, according to the evidence of *Symes*, took place immediately previous to the execution of this deed, must be taken as part of the whole transaction; and if so, the subsequent delivery of the deed by the defendant was conditional, and not absolute on his part; and then the defendant will be entitled to our judgment. The passage cited from *Comyns' Digest* is not correct. The authority quoted for the law there laid down is *De-*
gory

gory and *Roe's* case (a), where it is undoubtedly so stated in the course of the argument by three Judges, against the opinion of the fourth. But it does not appear in *Leonard* to have been finally decided; and upon looking to the report of the same case, in *Moore*, 300., it will be found, that, ultimately, the case was decided the other way. That case is, therefore, an authority against the present application.

1821.

 JOHNSON
against
BAKER.

Rule refused.

(a) 1 *Leon.* 152.KUCKEIN *against* WILSON.Tuesday,
May 15th.

TROVER for 800 quarters of oats. Plea, general issue. At the trial at the last assizes for the county of *York* before *Bayley* J., it appeared that the plaintiff, a *Prussian* merchant, in *August*, 1818, consigned to *Sellers* and Co. of *Hull*, as his factors, a quantity of oats for sale. The oats arrived in *September*, 1818. In *December*, 1818, *Sellers* and Co., who were merchants as well as factors, having accepted bills on account of the oats, which bills were afterwards paid, applied to the defendant for an advance, and being pressed for money, placed the oats which were then lying in the warehouses of *Wilson* and Co. in his hands for sale as a security for the loan of 840*l.* with interest.

A quantity of oats having been consigned by a merchant abroad, to be sold by *J. S.*, who was a merchant as well as factor, he placed them in the hands of *A.*, a corn-factor, as a security for advances made by him; but the oats were not to be sold without the consent of *J. S.* They remained in *A.*'s possession, upon these terms, for nine months, when

they were transferred to *A.* by a sale at the market price. No money actually passed, nor were any account sales rendered; but the amount of the price was allowed in account between *J. S.* and *A.*, leaving a balance in favour of the latter: Held, that this was in substance a pledge, and not a sale by the factor; and that no property passed to *A.*, although the jury had found it to be a *bonâ fide* transaction.

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WILSON.

The defendant was, however, not at liberty to sell the oats without their assent. The oats having remained in the defendant's hands unsold till the *August* following, he agreed with *Sellers* and Co. to become the purchaser of them at the market price, and accordingly a settlement of the account between them took place upon that footing, and *Sellers* and Co. upon that account still remained indebted to defendant about 300*l.* The learned Judge left two questions to the jury; 1st, whether the transaction in *August*, 1819, was *bonâ fide*, which the jury found in the affirmative; and, 2dly, whether in *August*, 1819, considering the circumstances under which *Sellers* and Co. were placed, they could properly, and in the honest discharge of their duty as agents, sell the oats to the defendant, knowing that by such sale no money would be produced which could be applied to the use of the plaintiff. The jury found a verdict for the plaintiff, damages 622*l.*

Scarlett, on a former day, by leave of the learned Judge, moved to enter a nonsuit; and he contended, that the jury having found the first point (*viz.* that the sale was *bonâ fide*) in favour of the defendant, he was entitled to judgment. For although it is clear that a factor cannot pledge, yet the subsequent sale in this case takes it out of that general rule. As to the sale being to a creditor of the factor, he referred to *George v. Clagett (a)*, and the other cases on that subject, as shewing that a party buying goods of a factor *bonâ fide*, and without knowledge of the principal, is entitled to set off against them a previous debt due from the factor, and contended, that if

(a) 7 T. R. 359.

the rule laid down by the learned Judge be correct, it would virtually over-rule those decisions.

Cur. adv. vult.

1821.

KUCKEIN
against
WILSON.

The judgment of the Court was on this day delivered by

ABBOTT C. J. According to the learned Judge's notes of this trial, it appears that *Sellers* and Co, residing in *Yorkshire*, received in *August*, 1818, from the plaintiff, a foreigner, a cargo of oats to be sold by them as his factors, and for his account. On the 28th of *September*, 1818, the whole quantity, viz. 745 quarters, was placed by *Sellers* and Co. in the warehouse of *Wilson* and Co., who were warehousemen at *Hull*. *Wilson*, the defendant, who was at the head of that firm, was also a corn-factor. On the 30th *September*, 1818, *Wilson* and Co. received from *Sellers* and Co. an order to deliver 10 quarters of these oats to a person of the name of *Clarke*, and on the 18th *December* they received an order to deliver the whole remaining quantity to *Wilson*, the defendant, or order, and place them to his account. On the 22d *December*, 1818, this quantity was accordingly transferred, in pursuance of the latter order. On the 20th *December*, two days previously to this transfer, *Wilson* had advanced 840*l.* to *Sellers* and Co. on the security of these oats, then lying at the warehouse of *Wilson* and Co., of which he expected to have the sale, accounting to *Sellers* and Co. for the proceeds, and paying or receiving the difference between the proceeds and the sum advanced, as the case might be. Upon this state of facts, it is evident that *Wilson* originally

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took

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took the oats as a pledge from *Sellers* and Co., who had authority to sell, but not to pledge. In the month of *September*, in the following year, the oats were delivered by *Wilson* and Co., to different persons, by the orders of *Wilson*. If the proof had stopped there, it would be manifest that *Wilson* having taken the plaintiff's goods in pledge from persons who had no authority to pledge them, and having afterwards transferred and delivered them to others, would be answerable for their value to the plaintiff in an action of trover. It is to be seen, therefore, whether the rights of the parties were varied by any thing that occurred between the original pledge to *Wilson* in *December*, 1818, and his transfer or delivery of the goods in *September* following. Now the substance of the intervening transactions is this: *Wilson* repeatedly applied to *Sellers* and Co. for permission to sell the oats, and was refused. The market continually declined. *Sellers* and Co. dissolved their partnership. *Sellers* afterwards authorised one *Tuke*, a broker, to dispose of the oats; and in *August*, 1819, *Tuke*, thus authorised, agreed with *Wilson*, that he, *Wilson*, should himself become the purchaser at a certain rate, being the then market price. At this time *Sellers* was in difficulties, and soon afterwards became a bankrupt, being at that time considerably indebted to the plaintiff. *Tuke*, who was a broker, did not enter this transaction in his broker's book, nor render any account sales; and being examined at the trial, he said that he did not consider this as a very regular transaction, and that he did not understand himself exactly as acting as a broker in the transaction. Upon this evidence there appears to be none of the ordinary characteristics of a mercantile sale, the price not being actually

actually paid by *Wilson*, and it being manifest that there was no intention that it should be paid. The intervening transactions amount to nothing more than an agreement, that the pawnee should take the pledge to himself at a fixed sum, to be set against the money that he had advanced upon the security of the pledge. Such an agreement does not in our opinion alter the nature of the original transaction, which was clearly a pledge; and the case may and ought to be decided in favour of the plaintiff upon the general principle which does not allow a factor to pledge, without contravening either the case of *George v. Clagett (a)*, cited at the bar, or, so far as I have been able to discover, all or any one of the unquoted cases or authorities which we were so earnestly cautioned not to over-rule. This rule must therefore be refused.

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 KUCKIN
 against
 WILSON.

Rule refused.

(a) 7 T. R. 359.

The KING *against* The Inhabitants of the Parish of ST. BENEDICT, in the Town and County of CAMBRIDGE.

 Wednesday,
 May 16th.

PRESENTMENT, in the usual form, by a magistrate against the defendants, for not repairing a highway. Plea, not guilty. The case was tried at the *Cambridge Lent* assizes, 1820, before *Graham B.*,

Where a road was set out by commissioners under a local act, and certain persons only were by the act to use it, but in

fact it had been used by the public for many years, it was held that this was not sufficient evidence of a dedication to the public; and that if it was, there being no evidence that the parish had acquiesced in that dedication, it was not a public road which the parish were bound to repair.

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 ants of
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when a verdict was found for the crown, subject to the opinion of this Court on the following case. The road, which was proved to be out of repair, was situate in the defendants' parish, and was originally made under the provisions of a local act passed in the 41 G. 3. By a clause in that act the commissioners were directed to set out two specific private roads, therein particularly described, which, when set out, were to be used by such persons only as were entitled to use an old occupation-road, running in the same direction with the latter of the two roads. The commissioners acting in execution of this power, by their award, dated *June 27*, 1803, set out the road presented as one of these two roads. From the date of the award, however, until the finding of the presentment, the road had been used by the public without interruption as a carriage-way. The question was, whether under these circumstances this was a public road, which the parish was bound to repair.

Barnewall, for the crown. This is a public road, and, consequently, the parish are bound to repair it. It is clearly established, that a public right may be acquired by the user of that which was originally a private road. *The Trustees of the Rugby Charity v. Merewether*. (a) The same rule applies to bridges. In *The King v. The West Riding of Yorkshire* (b) it was held that if a bridge be of public utility, and used by the public, the public must repair it, though built by an individual, and the use of it by the public was considered evidence that it was of public utility. In *Rex v.*

(a) 11 *East*, 375.(b) 2 *East*, 342.

Lloyd (c) it was held, that a road originally made for private convenience, but which had been open to the public for several years, without any person who passed through it meeting with interruption, was to be considered as dedicated to the public, and that it became a highway, to obstruct which was an indictable offence. These are authorities to shew, that where a road is originally made as a private road, even for the benefit of an individual, yet if it be permitted to the public to use it for a certain time, it is to be presumed that the owner thereby meant to dedicate it to the public, and it then becomes a public road. There is no distinction in point of principle between this case and the cases cited; for the clause in the act of parliament which directs that the new road should be used by such persons only as were entitled to use the old road is no more than a legislative declaration, which is implied by the common law in the case of every private road, that none but those having a right shall use it. It is clear that the old road might by user have become a public road, and the parish would then have become bound to repair it; and if so, there cannot be any reason why the new road, substituted for it by this act of parliament, should not also become a public road, by the same means.

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The King
against
The Inhabit-
ants of
St. BENEDICT.

Robinson, contra, was stopped by the Court.

ABBOTT C. J. I am of opinion that this was not a public road, and that the parish are not bound to repair it. It was in this case, as appears from the clause in the local act, compulsory on the owner of the soil to permit

(a) 1 *Camjb.* 260.

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 against
 The Inhabit-
 ants of
 St. BENEDICT.

a qualified passage, viz. to all persons entitled to use the old occupation-road. That circumstance distinguishes this from the cases cited. If this be a public road, it would follow that wherever, under an inclosure act, an occupation-road was set out, and it happened to be convenient for passage, it would become, almost immediately, a public road, and the burden of repairing it would be thrown on the parish.

BAYLEY J. I am of the same opinion. I do not accede to the doctrine, that because there is a dedication of the road by the owner of the soil, and the public use it, that the parish is therefore bound to repair. I think there ought to be, in addition to that, evidence of an acquiescence by the parish in that dedication. In the case of bridges, there always is what is to be considered as an acquiescence by the county. The county is not liable except for bridges made *in highways*; the making of the bridge, and thereby obstructing the road while the bridge is making, may be treated as a nuisance, and the county may, if it think fit, stop its progress by indictment, and the forbearing to prosecute in that way is an acquiescence by the county in the building of the bridge. But in the case of a parish, they have no power to prevent the opening of a road, or to obstruct the public use of it. It would be most unjust if, by the public use of what was at first a private road, the burden of repairing it could be removed from the persons to whom the use of it was at first confined, and cast upon the parish. Admitting, therefore, that in this case there was a dedication to the public, (which, I think, does not sufficiently appear,) and that the road was found to be a public benefit, (which I am not sure is the case,)

case,) I think that in consequence of the want of some act of acquiescence or adoption by the parish, they are not liable to the repair of this road.

HOLROYD and BEST, Justices, concurred.

Judgment for the defendants.

TURNER *against* LEECH.

Friday,
May 18th.

ASSUMPSIT by plaintiff, as indorsee, against the defendant, as a prior indorser of a bill of exchange for 50*l.*, payable three months after date. Plea, general issue. The cause was tried at the *Guildhall* sittings after *Hilary* term, 1818, before Lord *Ellenborough* C. J., when the jury found a verdict for the plaintiff, subject to the opinion of this Court, upon the following case. The defendant was the eighth and the plaintiff the eleventh indorser of the bill of exchange, which was indorsed by him to *Bennett*, and by him to *Fletcher*, and by him to *Hordern* and Co., bankers at *Wolverhampton*, who transmitted the same to their *London* correspondents, Messrs. *Sansom* and Co., who were the holders when the bill became due. The bill was duly presented for payment on *Saturday* the 30th *August*, 1817, and dishonoured. On *Monday*, the 1st *September*, 1817, *Sansom* and Co. wrote to *Hordern* and Co., at *Wolverhampton*, duly informing them of such dishonour, which letter was received by them on *Tuesday*, the 2d *September*. Notice of the dishonour was, on the 2d *September*, given to *Fletcher*, and on *Wednesday*, the 3d *September*, a letter, giving information of such dishonour, was sent by the post by *Fletcher* to *Bennett*, at *Stockport*,

The indorser of a bill of exchange which had been dishonoured, and which a subsequent indorser had made his own by laches, paid the bill, and immediately gave notice of dishonour to the defendant, a prior indorser: Held, that the plaintiff could not recover the amount, although it appeared that the defendant, in case successive notices had been given by all the parties on the bill, could not have received notice of dishonour at an earlier period.

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ants of
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 against
 LEECH.

Stockport, where he resided, and which letter was delivered there at his shop, on *Thursday*, the 4th *September*. This letter was not opened, and no notice was given to the plaintiff or any other party, before *Monday*, the 8th *September*. On the 8th *September*, the plaintiff first received notice of the dishonour, and immediately paid the amount of the bill to *Bennett*. *John Davies*, the tenth indorser, *Washington* and *Horner*, the ninth indorsers, and the defendant, the eighth indorser: all resided at *Stockport*. It was admitted, in addition, that the defendant had notice of the dishonour either on the 8th or 9th *September*, 1817.

Chitty, for the plaintiff. In this case the defendant received notice of dishonour on the 9th *September* at the latest; and if notice had been given to each successive indorser in the regular course, he would not have received it at an earlier period. Then he has received no injury by the neglect. Suppose the holder gives notice on the same day to six successive indorsers, and the seventh indorser receives notice of it six days afterwards, surely he ought not to be allowed to defend himself, on the ground of laches, when in the regular course he could not have received notice sooner.

J. Williams, contra, stopped by the Court.

ABBOTT C. J. In this case the plaintiff, who ought to have received notice of the dishonour of the bill of exchange from *Bennett*, on the 5th *September*, did not, in fact, receive notice till the 8th; and, therefore, he was clearly discharged by the laches of the holder. Then can he, by paying the bill, place the prior indorsers

dorsers in a worse situation than that in which they would otherwise have been? I think he cannot do so; and that in paying this bill he has paid it in his own wrong, and cannot be allowed to recover upon it against the defendant.

1821.

TURNER
against
LEECH.

Judgment for the defendant.

The Company of Proprietors of the MONMOUTH-SHIRE Canal Navigation *against* KENDALL and Others.

Friday,
May 18th.

THE declaration alleged that the defendants were indebted to the plaintiff for divers rates, tolls, and duties, for the tonnage of certain goods of the defendants, conveyed along a certain canal of the plaintiffs, and also for the use of the plaintiffs' canal, railways, and roads. The declaration likewise contained a count on a quantum meruit, with the usual money counts. The defendants pleaded the general issue, and paid into court the sum of 318*l.* The cause came on to be tried at the *Monmouth Lent* assizes, 1819, before *Richardson J.*, when the jury found a verdict for the plaintiffs, damages 206*l.* 3*s.*, subject to the opinion of the Court on the following case.

An act of parliament provided that the *M. Canal Company* should not take any higher or greater rate of tonnage than should, for the time being, be taken by the *B. Canal Company*; and the latter, by a resolution at a general assembly, and under their common seal, reduced their tolls:

Held, that the *M. Canal Company* could not question collaterally the validity of such resolution, but were bound by it.

By statute 32 G. 3. c. 102., the company of proprietors of the *Monmouth* Canal Navigation were esta-

The *B. Canal Company's* act directed that no reduction of the tolls should take place, unless assented to by two-thirds of the proprietors; but allowed them to vote by proxy, a form for which instrument was given by the act. Quære, whether such instrument requires to be stamped?

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blished with power to make and maintain a canal from *Pontnewynydd*, in the parish of *Trevithin*, into the river *Usk*, at the town of *Newport*, which canal was accordingly completed. By statute 33 G. 3. c. 96., the company of proprietors of the *Brecknock* Canal Navigation were established with the power to make a canal from the town of *Brecon*, to communicate with the before-mentioned *Monmouthshire* canal near *Pontymoile*, and to make railways as therein mentioned. By this act it was provided, that the said company of proprietors of the *Monmouthshire* Canal Navigation should pay to the company of proprietors of the *Brecknock* Canal Navigation the sum of 3000*l.*, upon the 25th day of *March*, 1794; and that in default of payment the same might be sued for and recovered by action of debt or on the case, in any court of law; and that the company of proprietors of the *Monmouthshire* Canal Navigation should not take or demand for any coals, goods, merchandises, or other things, which should pass or be navigated in boats or other vessels, upon the said *Monmouthshire* canal, to and from the said *Brecknock* canal, and passing thereon for two miles or upwards, any higher or greater rate of tonnage than should, for the time being, be taken by the company of proprietors of the *Brecknock* Canal Navigation, for any coals, goods, merchandise, or other things, passing or to be navigated on the *Brecknock* canal. The general assemblies of the proprietors of the *Brecknock* canal were directed to be held twice in every year, in *April* and *October*, for the purpose of choosing a committee; and it was provided that a special assembly might at any time be called by
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five of the committee, or ten proprietors, on causing notice thereof to be given in some newspaper published or circulated in the several counties of *Brecknock* and *Monmouth*, or in such other manner as the said company of proprietors should, at any general assembly, direct or appoint, declaring in such notice the place where and the time when such special assembly should be held, the place to be within such of the said counties of *Brecknock* and *Monmouth* respectively, where the cause of such meeting, if within either of the said counties only, should arise, and the time not to be less than fourteen days after such notice given; and also specifying in such notice the reason for and intention of holding the same. It was further provided, that the tolls on the *Brecknock* canal should be fixed at a general assembly of proprietors; and that it should be lawful for them, from time to time, at any general or special assembly to be held for that purpose, of which three calendar months' notice at the least should be given in the manner thereinbefore mentioned, to lower or reduce such of the said rates and tolls to be fixed as aforesaid, as the said company of proprietors should think proper; and afterwards, from time to time, at any general or special assembly, of which the like notice should be given, to advance and raise all or any of the said rates or tolls so lowered or reduced; provided always, that the said rates and tolls so to be advanced or raised as aforesaid should not in any case exceed the respective rates and tolls thereinbefore authorised to be taken, and that no reduction of the said rates or tolls should be made without the consent of so many of the said proprietors as should be possessed of at least two-thirds of the whole number of shares in the
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said undertaking: it also provided, that the proprietors at the general or special assemblies might vote by proxy. The proxy was directed to be as follows: "I *A. B.*, one of the proprietors of the *Brecknock* Canal Navigation, do hereby nominate and appoint *G. H.* to be my proxy in my name, and, in my absence, to vote and give my assent to or dissent from any business, matter, or thing relating to the said navigation and undertaking, which shall be mentioned or proposed at a meeting of the proprietors of the said navigation, or any of them, in such manner as the said *G. H.* shall think proper, according to his opinion and judgment, for the benefit of the said navigation and undertaking, or any thing appertaining thereto. In witness whereof, &c." The plaintiffs paid to the *Brecknock* canal company the said sum of 3000*l.*, on the 25th *March*, 1794. The following notice was published in the *Cambrian* newspaper on the 1st *February*, 1817, this being the earliest day of its being published in any newspaper: "*Brecknock* Canal Navigation: We, the undersigned, being proprietors of four or more shares in the said navigation, do hereby give notice, that at the general assembly to be held in the town of *Brecknock*, on the last *Thursday* in the month of *April* next, we intend to bring forward a motion and pass a resolution to reduce the several tonnages on the canal and railways of the company, on coal, lime, lime-stone, iron, and iron-stone, and on articles carried along the canal for the purpose of manufacture, and the manufactured produce of which is afterwards carried back along the canal." On the 24th *April*, 1817, a general assembly of the proprietors of the *Brecknock* canal company was held. At this meeting the motion con-
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tained in the foregoing notice was brought forward, and a great number of proxies were produced, in the form prescribed by the act, but without any stamp; and if these proxies were valid, the proprietors of more than two-thirds of the whole number of shares in the *Brecknock* company attended in person, or were lawfully represented, and gave their consent to the order hereinafter mentioned, for reducing the tolls on the *Brecknock* canal from 3*d.* to 2*d.* per ton per mile. The order agreed to at the said meeting was as follows: "It appearing to this meeting, that, by the reduction of the tolls and tonnages on iron carried along this canal, and the railway thereto belonging, great advantage is expected to accrue to the company of proprietors; Resolved unanimously, that such tolls and tonnages on iron be reduced from 3*d.* per ton per mile to 2*d.* per ton per mile, and that such reduction commence from the 29th day of *March* last; any order or regulation to the contrary notwithstanding." The seal of the *Brecknock* canal company was affixed to this order. From the completion of the *Brecknock* canal to the making of the order, the full tonnage of 3*d.* per ton on iron was uniformly taken by the company of proprietors of that canal. Since the making of the order, the toll, in point of fact, taken on the *Brecknock* canal, had been only 2*d.* per ton per mile. The question for the opinion of the Court was, whether the plaintiffs had a right to be paid for the defendants' iron carried along their canal, at the rate of 3*d.* or 2*d.*

Campbell for the plaintiffs. This question depends on the construction which the Court will give to the clause by which the plaintiffs are precluded from taking

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any higher toll than that taken by the *Brecknock* company. This must mean the toll legally taken by them, and not the toll actually taken. Unless that be so, it would follow that, upon an increase, even without authority by the *Brecknock* company, the plaintiffs would legally be entitled to an increased toll. The advantage or disadvantage must be reciprocal. It is admitted, that the plaintiffs can only take such toll as the *Brecknock* company legally take. Now the toll legally taken by the latter, previously to *April* 1817, was 3*d*. Then was it legally lowered on that occasion? In order to establish that, it must, according to the act of parliament, be shewn that the alteration was consented to by two-thirds of the proprietors. And if the proxies were not admissible, such consent was not given. Now a proxy was not admissible without a stamp. By 55 G. 3. c. 184, *sched.* part 1st, Every letter or power of attorney of any kind, or commission, or factory in the nature thereof, and every deed or other instrument of procuration, are required to be stamped. Now this is in its form a letter of attorney. The form is, I appoint G. H. to be my proxy, and whatever he does is ratified by the principal. At all events it is an instrument of procuration. The very word proxy, which is an abbreviation of the word procuracy shews this. Then if so, there are various statutes, all of which are embodied in 55 G. 3. c. 184., which shew that such instruments, if unstamped, are not available in any manner in law or equity, or in any manner whatsoever. The statutes 37 G. 3. c. 19. s. 3., 37 G. 3. c. 19. s. 9. clearly shew this. Here then the proxies were not available to shew the consent of two-thirds of the proprietors to the reduction of the tolls. Besides, in this case

case the notice was insufficient. By the act, no alteration in the tolls, whether at a general or special meeting, can be made, unless there be three months' notice. But here no such notice was given. The order therefore was on both grounds a nullity, and there has been no legal lowering of the toll from 3*d.* to 2*d.* The last toll legally taken on the *Brecknock* and *Abergavenny* canal was 3*d.*, which, therefore, is the toll legally to be taken by the plaintiffs. If so, they are entitled to the judgment of the Court.

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G. R. Cross contra. The plaintiffs might be entitled to judgment, if they could shew that the toll actually taken on the *Brecknock* canal, was so taken fraudulently, and without colour of authority. But here the toll was fixed at a general assembly of the proprietors, and by a resolution under their common seal. It was therefore quite sufficient to justify the words of the act, and besides the plaintiffs, who are strangers to the transaction, have not any right collaterally to question the regularity of these proceedings.

He was then stopped by the Court.

ABBOTT C. J. The act of parliament upon which this question depends, has provided, that the company of proprietors of the *Monmouthshire* Canal shall not take any higher or greater rate of tonnage than shall, for the time being, be taken by the company of proprietors of *Brecknock* Canal. The question therefore is, whether the present plaintiffs are entitled to any higher toll than that which, in fact, has been taken upon the *Brecknock* Canal; and I am clearly of opinion that

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they are not. If, indeed, without any colour of authority, the rates upon the *Brecknock* Canal had been lowered, the case would have been very different. But the facts here stated shew, that the reduction in the tolls has been made by a resolution passed at a general assembly, and under the seal of the company. I think, therefore, that a reduction, by virtue of such a resolution, clearly brings the case within the clause of the act, and that it is quite unnecessary for the Court to determine the question relative to the validity of the proxies, and the sufficiency of the notice; for I am clearly of opinion, that it is not competent for the plaintiffs collaterally to question the validity of the resolution passed by the proprietors of the *Brecknock* Canal at their general assembly. I am, therefore, of opinion, that there must be judgment for the defendants.

BAYLEY J. In this case it appears, that the toll of 2*d.* is the one actually taken upon the *Brecknock* Canal; but it is argued, that in this case it is competent for the plaintiffs to shew, that the *Brecknock* Canal Company have not complied with certain requisites prescribed by their act of parliament, and are, therefore, not warranted in reducing the toll to the sum actually taken. But it seems to me, that the plaintiffs have no right to raise this question; for the forms prescribed by the act of parliament were only intended for the purpose of regulating the interests of the *Brecknock* Canal Company, inter se; and if they are satisfied with the reduction of the tolls, it seems to me that the plaintiffs are not entitled to raise any objection. The act of parliament has prescribed, that the plaintiffs shall take no higher toll than is taken by the *Brecknock* Canal Company;

pany; and I think, therefore, that the plaintiffs have no claim in the present case.

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HOLROYD J. In this case, it seems to me, that the resolution of the *Brecknock* Canal Company reducing their tolls, being under their common seal, the Court are not called upon to decide as to the validity of that resolution. As long as the proprietors of that canal choose to submit to it, it is not competent for the present plaintiffs to dispute its validity. I think, therefore, that there should be judgment for the defendants.

BEST J. If it were necessary to determine whether a proxy required a stamp, I should desire time to consider of that question; but it is not necessary for the determination of the present case. I agree with the rest of the Court, that the regulations in the act of parliament are solely for the protection of the *Brecknock* Canal Company. If they acquiesce in the resolution for the reduction of the tolls, it is not competent to the present plaintiffs to shew that such resolution was irregularly passed.

Judgment for the defendants.

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Saturday,
May 19th.

The KING *against* The Inhabitants of ST. MARY,
in BURY ST. EDMUNDS.

The determination of the commissioners under an inclosure act, as to the boundaries of a parish to be inclosed, is not conclusive of the fact as to what were the boundaries antecedently to such determination.

UPON appeal against an order of two justices, by which *George Cutting, Sarah*, his wife, and four children, were removed from the parish of *Rougham*, in the county of *Suffolk*, to the parish of *St. Mary*, in *Bury St. Edmunds*, in the same county, the sessions confirmed the order, subject to the opinion of this Court, on the following case. The pauper, in 1783, gained a settlement, by hiring and service, in a house called *Eldo Farm*, which lay partly in *Rougham* and partly in *St. Mary*, in *Bury*. He had, at different times afterwards, in the course of 30 years and upwards, and up to the time of the removal, been relieved by *Rougham*, while living in another parish. In the years 1813 and 1814, separate inclosures took place of lands in *Rougham* and *Bury*. Under the *Rougham* inclosure act, in 1813, the commissioners, in their award, ascertained and fixed the boundary line between *Rougham* and *St. Mary*, in *Bury*, and thereby included within the latter, the apartment in which the pauper slept during his service at the *Eldo* farm; and the commissioner under the *Bury* inclosure act, in 1814, also ascertained and fixed the boundaries of *Bury* by his award, and thereby found and declared, that the boundary of the parish of *St. Mary*, in *Bury*, proceeded along the boundary of *Rougham* parish, through the *Eldo* farm-house, as the same had been ascertained and fixed under the *Rougham* inclosure. In a perambulation also made subsequently to

to these acts, the parishioners of *Bury* included the apartment in which the pauper slept within the parish of *St. Mary*, in *Bury*. These facts being proved by the respondents, the appellants contended, that the boundary line set out by the commissioners was not conclusive, as to the actual boundary before the award, and tendered to the Court evidence to prove, that, before the inclosure acts, the spot in question was in *Rougham*. This evidence was objected to; and the Court, considering the award of the commissioners as retrospective and conclusive, rejected the evidence, and confirmed the order of removal.

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Nolan and *Robinson* in support of the order of sessions. This evidence was properly rejected. By the 41 G. 3. c. 109. s. 3., the commissioners under an inclosure act are authorised to enquire into the boundaries of the parishes to be inclosed, and to set out the same; and the clause then states, that "after such boundaries shall be so ascertained, set out, determined, and fixed, the same shall, and they are hereby declared to be the boundaries of such parishes, &c." This, therefore, makes the decision of the commissioners final and conclusive. And the word "declared" shews, that, in construction of law, before such decision, the boundaries have always been as fixed by the commissioners. Then if so, the evidence to contradict the award was inadmissible.

Storks and *Dover*, contra. The general object of an act of parliament must be looked at. *Edwards v. Dick.* (a) The object here, was only to ascertain the

(a) 4 B. & A. 212.

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boundaries, for the purpose of arranging the different claims of individuals under the inclosure. It could have no reference to questions of this description. The local act gives an appeal to parties interested, which shews that the determination could not be intended to have a retrospective effect; for how could there have been any appeal against this determination, either by the churchwardens or by the pauper, who may both be interested in the question, as to his place of settlement. Many inconveniences may be pointed out, in case this decision of the commissioners be held to be retrospective; and it is not at all necessary, for any purpose of inclosure, that it should be so. Suppose a will, made previously to the award, described the lands devised as "all my lands in *Rougham*," it would follow, that this land would not pass. Many other instances may be put, in which similar inconveniences would follow. The proper construction is, therefore, that the determination of the commissioners has only a prospective effect. Here the question was, what the boundary had been before their award, and evidence on that point ought to have been received.

ABBOTT C. J. It seems to me, that great mischief might follow, if the Court were to hold, that the decision of the commissioners in this case, as to the boundaries of the parish, was conclusive, and at the same time retrospective; for many cases may be put, both of fines of lands and wills, in which such a decision might materially affect the rights of third persons. The best and safest course, therefore, will be, to hold such determination not to be conclusive evidence of what the boundaries were previously to the period when it was made. In that case the sessions ought to have received
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the evidence which they have rejected; and I think, therefore, that the order of sessions should be quashed, and the case sent back to be reheard.

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BAYLEY J. If the decision of the commissioners were conclusive, to shew what the boundaries of the parish were in times past, it might happen that a mistake on their part might make it necessary to apply to the Court of Common Pleas, for the purpose of amending a fine of lands, levied before the inclosure; and if the two parishes between which the boundary was ascertained, lay in different counties, that Court would be unable to amend the fine. That is one inconvenience which might arise from our holding such determination to have a retrospective effect. I agree, therefore, that this evidence ought to have been received.

HOLROYD J. The words of the statute do not appear to me to be retrospective: they only state that the commissioners shall ascertain the boundaries; and “after they shall be so ascertained, the same shall and are hereby declared to be the boundaries of such parishes, &c.” Now these words do not necessarily import that the boundaries to be ascertained were the boundaries before that period. Considering, therefore, that cases may occur in which mistakes made by the commissioners may affect the private rights of others, I am of opinion, that we ought not to go further than we are compelled by the strict words of the act; and I think that the evidence ought to have been received, and that the case should go back to the sessions.

BEST J. concurred.

Case sent back to the Sessions,

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Monday,
May 21st.

MARR *against* SMITH.

The plaintiff, after judgment recovered, settled the action with the defendant, and employed a new attorney to enter up satisfaction on the record: Held, that the defendant was entitled to be discharged out of custody, although the lien of the plaintiff's attorney on the costs had not been satisfied.

DENMAN had obtained a rule nisi for discharging the defendant out of custody. It appeared from the affidavits, that the plaintiff had recovered a verdict against the defendant, at the last Summer assizes for *Nottingham*, for 598*l.*, for which sum final judgment had been obtained in last *Michaelmas* term, the costs taxed at 62*l.* 4*s.*, and the defendant taken in execution for the whole amount. Subsequently to this the plaintiff and defendant compromised the suit, upon the defendant's assigning over to *Wells*, an attorney, at *Nottingham*, for the benefit of the plaintiff, a sum of 128*l.* 5*s.*, due from a third person to the defendant. This sum, it appeared from the affidavits, *Wells* had not hitherto received. On the 24th *March* last, the plaintiff executed a warrant of attorney prepared by *Wells*, authorising certain attorneys of this court to enter satisfaction upon the record; which was accordingly done. The affidavits, in answer, stated that the whole transaction was fraudulent and collusive, and without the knowledge, privity, or consent, of the plaintiff's attorney, and that it was done with a view to defraud him of his costs. It was further sworn, that the defendant, who had himself been an attorney, had been expressly informed that the costs of the plaintiff's attorney were wholly unpaid, and cautioned against settling with the plaintiff, until those costs had been satisfied.

Reader shewed cause, and contended, that the defendant was not entitled to be discharged, the lien of the plain-

plaintiff's attorney not having been satisfied. And he cited *Welsh v. Hole* (a), *Read v. Dupper* (b), *Randle v. Turner* (c), and *Swain v. Senate* (d), as authorities in point, to shew that the plaintiff is not at liberty to settle the debt, and so to defraud his attorney of his lien for his costs.

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Denman, contra, contended, that no case had been cited in which it had been held, that the plaintiff's attorney had a lien on the defendant's body. In *Graves v. Eades* (e), the Court, after a discharge by the plaintiff, refused to permit the attorney to sue out a second execution for his costs. Here, after satisfaction has been entered on the record, the defendant is entitled to his discharge.

ABBOTT C. J. I cannot but disapprove very much of the conduct of the defendant, who, having been an attorney himself, must have known that the attorney for the plaintiff had a lien for the costs on the judgment recovered. But here the plaintiff has, by a new attorney, caused satisfaction to be entered on the record; and there is no authority for saying that, under such circumstances, the Court can refuse to discharge a defendant out of custody. I am, therefore, of opinion that the rule must be made absolute.

BAYLEY J. This case was before me at chambers, and I then refused to discharge the defendant; and for this reason, amongst others, that I doubted whether, in va-

(a) *Douglas*, 238(b) 6 *T. R.* 361.(c) 6 *T. R.* 456.(d) 2 *N. R.* 99.(e) 5 *Taunt.* 429.

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cation, a single judge had a power to do so ; but now I am of opinion, that this rule ought to be made absolute. For it seems to me that we should go a great deal too far, if we were to hold that the attorney for the plaintiff, in opposition to his client's wishes, and after satisfaction has been entered on the record, may, on account of his lien for the costs, still keep a defendant in custody. Here the judgment has been satisfied, and upon that ground the defendant applies to be discharged. The case of *Martin v. Francis* (a) is a strong case for the defendant. There, the plaintiff's attorney had ordered the sheriff not to discharge the defendant, stating, that he had a lien for his costs, notwithstanding which, by the plaintiff's directions, the sheriff afterwards discharged him ; and, an application having been made that the sheriff should pay the attorney's costs, the rule was discharged : on the ground that the attorney had no lien on the defendant's body. In this case, the settlement is stated to be made on the ground of money hereafter to be advanced, and if an application were made to stop the money in the hands of *Wells*, in all probability the Court would grant the rule. Here the plaintiff is responsible himself for the costs to his attorney, and the money, which is the consideration for the settlement, is stated to be in the hands of a person amenable to the Court. I think, therefore, the rule should be made absolute.

HOLROYD J. I am of opinion, that in this case the defendant is entitled to his discharge, satisfaction having been entered on the record. The plaintiff's attorney has no lien on the person of the defendant. As soon as

(a) *B. & A.* 402.

judgment is obtained, his power is at an end also. It is true that he has a lien for his costs, and that the Court will assist him to make the subject-matter recovered by the judgment available for that purpose; but they will go no further. The case of *Swain v. Senatc* does not clash with the present decision; there the plaintiff's and defendant's bail having colluded to cheat the plaintiff's attorney, he proceeded to judgment, and issued a scire facias against the bail, and, an application having been made to stay the proceedings, it was refused by the Court. In that case, *Chambre J.* stated, that the settlement was void, because the acceptance of a smaller sum is not in law a satisfaction of a greater; and, therefore, the plaintiff's claim there was not legally barred. But here, satisfaction having been entered of record, there is a legal bar to the plaintiff's claim. And no process can issue for any thing merely due to the plaintiff's attorney after the claim of the plaintiff is legally at an end. The defendant is, therefore, entitled to be discharged.

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BEST J. concurred.

Rule absolute.

The KING *against* The Inhabitants of MA-
 CHYNLLETH and PENEGOES.

Wednesday,
 May 23d.

THE following order of sessions of the county of *Montgomery* was removed by certiorari into this court.

“ It is ordered, that the fine heretofore imposed by the Court on the inhabitants of the township of *Machynlleth* and

The Court of
 Quarter Ses-
 sion cannot im-
 pose more than
 one fine for the
 non-repair of a
 bridge.

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and the parish of *Penegoes*, for not repairing *Pont-felingerrig* bridge, be, and the same is hereby increased by the sum of 200*l*." *Taunton* obtained a rule nisi for quashing the order. It appeared from the affidavits that the defendants had been presented at the *January* sessions, 1818, for the non-repair of the bridge in question; to which presentment, they, at the same sessions, submitted, and a fine of 300*l*. was imposed and afterwards levied upon them. At the last *Michaelmas* session 1820, the fine not having been sufficient, the order in question was made, imposing a second fine of 200*l*. The Court, after hearing *Campbell* in support of the order of sessions, were of opinion, that the power of the sessions was at an end after the first fine, and that they had no jurisdiction to impose a second, and they referred to *Rex v. Inhabitants of Old Malton (a)* as an authority directly in point.

Order of sessions quashed.

(a) *Holroyd J.* read the following MS. note of the case.

The KING against The Inhabitants of The Parish of OLD MALTON.
Yorkshire Summer Assizes, 9th August, 1794. Cor. Lawrence J.

THIS was an indictment for not repairing a highway. The defendants had submitted to a fine, which had been apportioned between the parishioners and the trustees of the turnpike (the road indicted being turnpike), pursuant to the power given by the general turnpike act. *Holroyd* applied for a further fine, the whole fine being laid out on the way, and the way being still out of repair. *Lawrence J.* doubted his power to give any further fine, on the ground that the Court had given their judgment; and though *Salk. 358.* (see *S. C. 6 Mod. 163.*) states that the judgment is not at an end by the defendants' coming in and submitting to a fine, and that if the road is not put in repair, writs of *distringas* shall issue against the defendants till the road is completed: he held, that those writs are now the only remedy on the present indictment; that the fine is the punishment for the neglect and offence of which the defendants are indicted; and though the Court may compel an actual repair, yet the punishment has been inflicted, and they cannot inflict a further punishment or fine; that the parish may be again indicted, and a fine imposed and apportioned on such indictment. Vide also 1 *Hawk. c. 76. s. 94.*

1821.

The KING *against* EDMONDS and Others.Thursday,
May 24th.

THIS was an indictment against the defendants for a conspiracy, upon which they were tried and found guilty at the last summer assizes for the county of *Warwick*, before the Lord Chief Baron. *Denman* in last *Michaelmas* term obtained a rule nisi for a new trial on the three following grounds; 1st, That the Lord Chief Baron had refused to allow a challenge to the array, on the ground of the alleged unindifferency of the master of the crown office in nominating the special jury, and to appoint triers to try the facts alleged in support of that charge; 2dly, That he refused similarly to allow a challenge to the array, on the ground of the alleged unindifferency of the sheriff, and to appoint triers as before; 3dly, That he refused to permit questions to be put to the special jurymen, as to whether they had expressed themselves adversely to the defendants before the trial, although (the special jury,

No challenge can be taken either to the array or to the polls, until a full jury have appeared; and therefore, where the challenges are taken previously, they are irregularly made.

The disallowing of a challenge is not a ground for a new trial, but for a venire de novo; and every challenge must be propounded in such a way as that it may be put at the time upon the nisi prius record, so that the adverse party may either demur, or counter-plead, or deny

the matter of challenge, in which last case only triers are to be appointed; and therefore, where the challenges were not put on the record, the defendants were held not to be in a condition to ask the opinion of this Court, as a matter of right, upon their sufficiency.

There can be no challenge to the array on the ground of unindifferency in the Master of the Crown Office, he being the officer of the Court expressly appointed to nominate the jury. The only remedy in such a case is to apply to the Court by motion to appoint some other officer to nominate the jury.

The Master of the Crown Office, in nominating the jury, selected the names of the jurors, and did not take them by chance from the freeholders' book. He also took those only whose names had the addition of "esquire" or of some higher degree; and included some persons who were in the commission of the peace: Held, that in so doing he was perfectly right. He also included in his nomination some persons, who, as grand jurymen, had found the indictment, and persisted in his opinion as to their sufficiency, unless the crown would consent to abandon them, which was done, and others were then substituted in their places: Held, that he was wrong in his opinion, but that there was no ground for presuming partiality.

The sheriff's officer had neglected to summon one of the 24 special jurymen returned on the pannel: Held, that this was no ground of challenge to the array for unindifferency on the part of the sheriff.

Held, also, that it is not competent to ask jurymen (whether special jurymen or talesmen) if they have not, previously to the trial, expressed opinions hostile to the defendants and their cause, in order to found a challenge to the polls on that ground; but that such expressions must be proved by extrinsic evidence.

not

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*Saturday,
May 19th.***The KING against The Inhabitants of ST. MARY,
in BURY ST. EDMUNDS.**

The determination of the commissioners under an inclosure act, as to the boundaries of a parish to be inclosed, is not conclusive of the fact as to what were the boundaries antecedently to such determination.

UPON appeal against an order of two justices, by which *George Cutting, Sarah*, his wife, and four children, were removed from the parish of *Rougham*, in the county of *Suffolk*, to the parish of *St. Mary*, in *Bury St. Edmunds*, in the same county, the sessions confirmed the order, subject to the opinion of this Court, on the following case. The pauper, in 1783, gained a settlement, by hiring and service, in a house called *Eldo Farm*, which lay partly in *Rougham* and partly in *St. Mary*, in *Bury*. He had, at different times afterwards, in the course of 30 years and upwards, and up to the time of the removal, been relieved by *Rougham*, while living in another parish. In the years 1813 and 1814, separate inclosures took place of lands in *Rougham* and *Bury*. Under the *Rougham* inclosure act, in 1813, the commissioners, in their award, ascertained and fixed the boundary line between *Rougham* and *St. Mary*, in *Bury*, and thereby included within the latter, the apartment in which the pauper slept during his service at the *Eldo* farm; and the commissioner under the *Bury* inclosure act, in 1814, also ascertained and fixed the boundaries of *Bury* by his award, and thereby found and declared, that the boundary of the parish of *St. Mary*, in *Bury*, proceeded along the boundary of *Rougham* parish, through the *Eldo* farm-house, as the same had been ascertained and fixed under the *Rougham* inclosure. In a perambulation also made subsequently
to

to these acts, the parishioners of *Bury* included the apartment in which the pauper slept within the parish of *St. Mary*, in *Bury*. These facts being proved by the respondents, the appellants contended, that the boundary line set out by the commissioners was not conclusive, as to the actual boundary before the award, and tendered to the Court evidence to prove, that, before the inclosure acts, the spot in question was in *Rougham*. This evidence was objected to; and the Court, considering the award of the commissioners as retrospective and conclusive, rejected the evidence, and confirmed the order of removal.

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Nolan and *Robinson* in support of the order of sessions. This evidence was properly rejected. By the 41 G. 3. c. 109. s. 3., the commissioners under an inclosure act are authorised to enquire into the boundaries of the parishes to be inclosed, and to set out the same; and the clause then states, that "after such boundaries shall be so ascertained, set out, determined, and fixed, the same shall, and they are hereby declared to be the boundaries of such parishes, &c." This, therefore, makes the decision of the commissioners final and conclusive. And the word "declared" shews, that, in construction of law, before such decision, the boundaries have always been as fixed by the commissioners. Then if so, the evidence to contradict the award was inadmissible.

Storks and *Dover*, contra. The general object of an act of parliament must be looked at. *Edwards v. Dick.* (a) The object here, was only to ascertain the

(a) 4 B. & A. 212.

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boundaries, for the purpose of arranging the different claims of individuals under the inclosure. It could have no reference to questions of this description. The local act gives an appeal to parties interested, which shews that the determination could not be intended to have a retrospective effect; for how could there have been any appeal against this determination, either by the churchwardens or by the pauper, who may both be interested in the question, as to his place of settlement. Many inconveniences may be pointed out, in case this decision of the commissioners be held to be retrospective; and it is not at all necessary, for any purpose of inclosure, that it should be so. Suppose a will, made previously to the award, described the lands devised as "all my lands in *Rougham*," it would follow, that this land would not pass. Many other instances may be put, in which similar inconveniences would follow. The proper construction is, therefore, that the determination of the commissioners has only a prospective effect. Here the question was, what the boundary had been before their award, and evidence on that point ought to have been received.

ABBOTT C. J. It seems to me, that great mischief might follow, if the Court were to hold, that the decision of the commissioners in this case, as to the boundaries of the parish, was conclusive, and at the same time retrospective; for many cases may be put, both of fines of lands and wills, in which such a decision might materially affect the rights of third persons. The best and safest course, therefore, will be, to hold such determination not to be conclusive evidence of what the boundaries were previously to the period when it was made. In that case the sessions ought to have received the

the evidence which they have rejected; and I think, therefore, that the order of sessions should be quashed, and the case sent back to be reheard.

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BAYLEY J. If the decision of the commissioners were conclusive, to shew what the boundaries of the parish were in times past, it might happen that a mistake on their part might make it necessary to apply to the Court of Common Pleas, for the purpose of amending a fine of lands, levied before the inclosure; and if the two parishes between which the boundary was ascertained, lay in different counties, that Court would be unable to amend the fine. That is one inconvenience which might arise from our holding such determination to have a retrospective effect. I agree, therefore, that this evidence ought to have been received.

HOLROYD J. The words of the statute do not appear to me to be retrospective: they only state that the commissioners shall ascertain the boundaries; and "after they shall be so ascertained, the same shall and are hereby declared to be the boundaries of such parishes, &c." Now these words do not necessarily import that the boundaries to be ascertained were the boundaries before that period. Considering, therefore, that cases may occur in which mistakes made by the commissioners may affect the private rights of others, I am of opinion, that we ought not to go further than we are compelled by the strict words of the act; and I think that the evidence ought to have been received, and that the case should go back to the sessions.

BEST J. concurred.

Case sent back to the Sessions,

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Monday,
May 21st.

MARR *against* SMITH.

The plaintiff, after judgment recovered, settled the action with the defendant, and employed a new attorney to enter up satisfaction on the record: Held, that the defendant was entitled to be discharged out of custody, although the lien of the plaintiff's attorney on the costs had not been satisfied.

DENMAN had obtained a rule nisi for discharging the defendant out of custody. It appeared from the affidavits, that the plaintiff had recovered a verdict against the defendant, at the last Summer assizes for *Nottingham*, for 598*l.*, for which sum final judgment had been obtained in last *Michaelmas* term, the costs taxed at 62*l.* 4*s.*, and the defendant taken in execution for the whole amount. Subsequently to this the plaintiff and defendant compromised the suit, upon the defendant's assigning over to *Wells*, an attorney, at *Nottingham*, for the benefit of the plaintiff, a sum of 128*l.* 5*s.*, due from a third person to the defendant. This sum, it appeared from the affidavits, *Wells* had not hitherto received. On the 24th *March* last, the plaintiff executed a warrant of attorney prepared by *Wells*, authorising certain attorneys of this court to enter satisfaction upon the record; which was accordingly done. The affidavits, in answer, stated that the whole transaction was fraudulent and collusive, and without the knowledge, privity, or consent, of the plaintiff's attorney, and that it was done with a view to defraud him of his costs. It was further sworn, that the defendant, who had himself been an attorney, had been expressly informed that the costs of the plaintiff's attorney were wholly unpaid, and cautioned against settling with the plaintiff, until those costs had been satisfied.

Reader shewed cause, and contended, that the defendant was not entitled to be discharged, the lien of the plain-

plaintiff's attorney not having been satisfied. And he cited *Welsh v. Hole* (a), *Read v. Dupper* (b), *Randle v. Turner* (c), and *Swain v. Senate* (d), as authorities in point, to shew that the plaintiff is not at liberty to settle the debt, and so to defraud his attorney of his lien for his costs.

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Denman, contra, contended, that no case had been cited in which it had been held, that the plaintiff's attorney had a lien on the defendant's body. In *Graves v. Eades* (e), the Court, after a discharge by the plaintiff, refused to permit the attorney to sue out a second execution for his costs. Here, after satisfaction has been entered on the record, the defendant is entitled to his discharge.

ABBOTT C. J. I cannot but disapprove very much of the conduct of the defendant, who, having been an attorney himself, must have known that the attorney for the plaintiff had a lien for the costs on the judgment recovered. But here the plaintiff has, by a new attorney, caused satisfaction to be entered on the record; and there is no authority for saying that, under such circumstances, the Court can refuse to discharge a defendant out of custody. I am, therefore, of opinion that the rule must be made absolute.

BAYLEY J. This case was before me at chambers, and I then refused to discharge the defendant; and for this reason, amongst others, that I doubted whether, in va-

(a) *Douglas*, 238

(b) 6 T. R. 361.

(c) 6 T. R. 456.

(d) 2 N. R. 99.

(e) 5 Taunt. 429.

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cation, a single judge had a power to do so ; but now I am of opinion, that this rule ought to be made absolute. For it seems to me that we should go a great deal too far, if we were to hold that the attorney for the plaintiff, in opposition to his client's wishes, and after satisfaction has been entered on the record, may, on account of his lien for the costs, still keep a defendant in custody. Here the judgment has been satisfied, and upon that ground the defendant applies to be discharged. The case of *Martin v. Francis* (a) is a strong case for the defendant. There, the plaintiff's attorney had ordered the sheriff not to discharge the defendant, stating, that he had a lien for his costs, notwithstanding which, by the plaintiff's directions, the sheriff afterwards discharged him ; and, an application having been made that the sheriff should pay the attorney's costs, the rule was discharged : on the ground that the attorney had no lien on the defendant's body. In this case, the settlement is stated to be made on the ground of money hereafter to be advanced, and if an application were made to stop the money in the hands of *Wells*, in all probability the Court would grant the rule. Here the plaintiff is responsible himself for the costs to his attorney, and the money, which is the consideration for the settlement, is stated to be in the hands of a person amenable to the Court. I think, therefore, the rule should be made absolute.

HOLROYD J. I am of opinion, that in this case the defendant is entitled to his discharge, satisfaction having been entered on the record. The plaintiff's attorney has no lien on the person of the defendant. As soon as

(a) *B. & A.* 402.

judgment is obtained, his power is at an end also. It is true that he has a lien for his costs, and that the Court will assist him to make the subject-matter recovered by the judgment available for that purpose; but they will go no further. The case of *Swain v. Senate* does not clash with the present decision; there the plaintiff's and defendant's bail having colluded to cheat the plaintiff's attorney, he proceeded to judgment, and issued a scire facias against the bail, and, an application having been made to stay the proceedings, it was refused by the Court. In that case, *Chambre J.* stated, that the settlement was void, because the acceptance of a smaller sum is not in law a satisfaction of a greater; and, therefore, the plaintiff's claim there was not legally barred. But here, satisfaction having been entered of record, there is a legal bar to the plaintiff's claim. And no process can issue for any thing merely due to the plaintiff's attorney after the claim of the plaintiff is legally at an end. The defendant is, therefore, entitled to be discharged.

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BEST J. concurred.

Rule absolute.

The KING *against* The Inhabitants of MACHYNLLETH and PENEGOES.

Wednesday,
 May 23d.

THE following order of sessions of the county of *Montgomery* was removed by certiorari into this court.
 " It is ordered, that the fine heretofore imposed by the Court on the inhabitants of the township of *Machynlleth*
 and

The Court of
 Quarter Ses-
 sion cannot im-
 pose more than
 one fine for the
 non-repair of a
 bridge.

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and the parish of *Penegoes*, for not repairing *Pont-felingerrig* bridge, be, and the same is hereby increased by the sum of 200*l*." *Taunton* obtained a rule nisi for quashing the order. It appeared from the affidavits that the defendants had been presented at the *January* sessions, 1818, for the non-repair of the bridge in question; to which presentment, they, at the same sessions, submitted, and a fine of 300*l*. was imposed and afterwards levied upon them. At the last *Michaelmas* session 1820, the fine not having been sufficient, the order in question was made, imposing a second fine of 200*l*. The Court, after hearing *Campbell* in support of the order of sessions, were of opinion, that the power of the sessions was at an end after the first fine, and that they had no jurisdiction to impose a second, and they referred to *Rex v. Inhabitants of Old Malton (a)* as an authority directly in point.

Order of sessions quashed.

(a) *Holroyd J.* read the following MS. note of the case.

The KING against The Inhabitants of The Parish of OLD MALTON.
 Yorkshire Summer Assizes, 9th August, 1794. Cor. *Lawrence J.*

THIS was an indictment for not repairing a highway. The defendants had submitted to a fine, which had been apportioned between the parishioners and the trustees of the turnpike (the road indicted being turnpike), pursuant to the power given by the general turnpike act. *Holroyd* applied for a further fine, the whole fine being laid out on the way, and the way being still out of repair. *Lawrence J.* doubted his power to give any further fine, on the ground that the Court had given their judgment; and though *Salk. 358.* (see *S. C. 6 Mod. 163.*) states that the judgment is not at an end by the defendants' coming in and submitting to a fine, and that if the road is not put in repair, writs of *distringas* shall issue against the defendants till the road is completed: he held, that those writs are now the only remedy on the present indictment; that the fine is the punishment for the neglect and offence of which the defendants are indicted; and though the Court may compel an actual repair, yet the punishment has been inflicted, and they cannot inflict a further punishment or fine; that the parish may be again indicted, and a fine imposed and apportioned on such indictment. Vide also 1 *Hawk. c. 76. s. 94.*

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The KING *against* EDMONDS and Others.Thursday,
May 24th.

THIS was an indictment against the defendants for a conspiracy, upon which they were tried and found guilty at the last summer assizes for the county of *Warwick*, before the Lord Chief Baron. *Denman* in last *Michaelmas* term obtained a rule nisi for a new trial on the three following grounds; 1st, That the Lord Chief Baron had refused to allow a challenge to the array, on the ground of the alleged unindifferency of the master of the crown office in nominating the special jury, and to appoint triers to try the facts alleged in support of that charge; 2dly, That he refused similarly to allow a challenge to the array, on the ground of the alleged unindifferency of the sheriff, and to appoint triers as before; 3dly, That he refused to permit questions to be put to the special jurymen, as to whether they had expressed themselves adversely to the defendants before the trial, although (the special jury,

No challenge can be taken either to the array or to the polls, until a full jury have appeared; and therefore, where the challenges are taken previously, they are irregularly made.

The disallowing of a challenge is not a ground for a new trial, but for a venire de novo; and every challenge must be propounded in such a way as that it may be put at the time upon the nisi prius record, so that the adverse party may either demur, or counter-plead, or deny

the matter of challenge, in which last case only triers are to be appointed; and therefore, where the challenges were not put on the record, the defendants were held not to be in a condition to ask the opinion of this Court, as a matter of right, upon their sufficiency.

There can be no challenge to the array on the ground of unindifferency in the Master of the Crown Office, he being the officer of the Court expressly appointed to nominate the jury. The only remedy in such a case is to apply to the Court by motion to appoint some other officer to nominate the jury.

The Master of the Crown Office, in nominating the jury, selected the names of the jurors, and did not take them by chance from the freeholders' book. He also took those only whose names had the addition of "esquire" or of some higher degree; and included some persons who were in the commission of the peace: Held, that in so doing he was perfectly right. He also included in his nomination some persons, who, as grand jurymen, had found the indictment, and persisted in his opinion as to their sufficiency, unless the crown would consent to abandon them, which was done, and others were then substituted in their places: Held, that he was wrong in his opinion, but that there was no ground for presuming partiality.

The sheriff's officer had neglected to summon one of the 24 special jurymen returned on the pannel: Held, that this was no ground of challenge to the array for unindifferency on the part of the sheriff.

Held, also, that it is not competent to ask jurymen (whether special jurymen or talesmen) if they have not, previously to the trial, expressed opinions hostile to the defendants and their cause, in order to found a challenge to the polls on that ground; but that such expressions must be proved by extrinsic evidence.

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not being full,) he did permit such questions to be put to the talesmen before they were sworn. The motion was supported by affidavits, stating the different grounds of the complaint against the master of the crown office and the sheriff. Against this rule, cause was shewn in *Hilary* term, upon affidavits, by the Attorney-general and Solicitor-general, with whom were *Vaughan Serjt. Clarke, Reader, Littledale, and Balguy*. *Denman* and *Hill* were then heard in support of the rule. The whole facts and arguments on both sides are so fully stated by the Court in giving judgment, that it has been deemed expedient to omit them here.

ABBOTT C. J. This was an application to the Court for a new trial. The cause (an indictment prosecuted by his *Majesty's* Attorney-general for a misdemeanour) came on to be tried by a special jury at the last Summer assizes at *Warwick*. The special jury was struck in or soon after *Hilary* term, 1820, and the record was carried down for trial at the Spring assizes in that year, but stood over until the Summer. The ground of the motion for a new trial was the refusal to allow certain challenges, supposed to have been duly taken at the trial: viz. a challenge to the array, and a challenge to some of the polls. The challenge to the array was made on two distinct grounds; first, the supposed unindifferency of the Master of the Crown Office, by whom the special jury was nominated. Secondly, the supposed unindifferency of the sheriff. The supposed challenge to the polls was on the ground of opinions, supposed to have been expressed by the jurors hostile to the defendants, or some of them, and to their cause. Before I make any comments on these grounds, I will observe

observe that it is an established rule as to proceedings of this kind, that no challenge either to the array or to the polls can be taken, until a full jury shall have appeared, and if twelve of those named in the original pannel do not appear, a tales must be prayed, and the appearance of twelve obtained before any challenge be made. Upon this point, it will be sufficient to refer to the case of *Vicars v. Langham*, *Hob.* 235. In that case, the plaintiff first prayed a tales, and after the jury made full by tales, he challenged the whole pannel by exception to the sheriffs. The pannel was thereupon quashed, and a new jury returned by the coroners, by which the cause was tried. A writ of error was brought, and the exception taken thereon was, that the plaintiff having first prayed a tales to the sheriffs and obtained it, was estopped to challenge the pannel for exceptions to the sheriffs. But it was resolved, that there could be no challenge, neither to the pannel nor to the poll, till first there were a full jury, so that the jury not appearing full, there was a necessity to have a tales, or else the challenge could not have been taken; and so the cause would have remained *pro defectu juratorum*, if the plaintiff had not prayed it, for the defendant could not, and so the judgment was affirmed. Now every one of the challenges taken at this trial, was taken and made before a full jury had appeared, and therefore made irregularly and out of season. It must further be observed, that the disallowing of a challenge is a ground not for a new trial, but for what is strictly and technically a *venire de novo*. The party complaining thereof applies to the Court, not for the exercise of the sound and legal discretion of the judges, but for the benefit of an imperative rule of law, and the improper granting,

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or the improper refusing of a challenge, is alike the foundation for a writ of error. Every challenge, either to the array or to the polls ought to be propounded in such a way, that it may be put at the time upon the nisi prius record, and so particular were they in early times, when challenges were more in use, that it was made a question in 27 *H.* 8. 13. *B. pl.* 38., whether it was not a fatal defect to omit the concluding of it, with an “*Et hoc paratus est verificare,*” and it was, because many precedents were shewn without such a conclusion, and the justices did not choose to depart from the precedents that it was held unnecessary. When a challenge is made, the adverse party may either demur (which brings into consideration the legal validity of the matter of challenge) or counterplead, (by setting up some new matter consistent with the matter of challenge, to vacate and annul it as a ground of challenge,) or he may deny what is alleged for matter of challenge, and it is then, and then only that triers are to be appointed. The case before quoted from Hobart furnishes an instance of a writ of error, for the allowance of a challenge, which could not have been brought, unless the challenge had been returned on the postea: and in comparatively modern times there are two instances of the like nature. One in *Kynaston v. Mayor, &c. of Shrewsbury, Andr.* 85., and another in *Hesketh v. Braddock, Burr.* 1847. In the latter case, the defendant challenged both the array and the polls; both challenges are entered upon the record. To the first, (and probably to the second) the plaintiff demurred. The demurrer was allowed, the challenges over-ruled, and the cause tried. Error was brought thereon, and the judgment reversed, and upon the
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judgment of reversal, a writ of error was brought in the King's Bench. The validity of the grounds of challenge was then again discussed, and the judgment of reversal was affirmed. The challenges, therefore, ought in this case to have been put upon the record, and the defendants are not in a condition in strictness to ask of the Court an opinion upon their sufficiency. But notwithstanding this defect of form on the part of the defendants, the Court has taken into consideration the validity of these challenges, and it is upon the ground of their invalidity, not on the defect of form, that we think the new trial ought to be refused. It has never been the practice of the Court to grant a new trial, for the purpose of giving a party an opportunity of advancing an untenable objection, and I have noticed these points of irregularity, chiefly in answer to one of the topics that was addressed to us on the part of the defendants. It was said the defendants had a right to make their challenge, and to have it tried, whether they could sustain it by proof or not. To which I answer, if they had that right and would insist upon it, they should have pursued it rightly and regularly. Not having done so, their ground and their intended proof must be open to examination. And if upon examination, it appear that they could not have sustained their challenge, they are not entitled to a delay of justice, in order to give them an opportunity of making an experiment in due form, which, in the opinion of the Court, would be deficient in substance. I proceed, therefore, to examine the grounds and substance of the several challenges.

And first, as to the challenge of the array, that is, of the whole special jury pannel, for the supposed unindif-

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ferency of the Master of the Crown Office. To sustain this charge of unindifferency, several matters of fact were mentioned, from some or all of which it was contended, that triers, if appointed, might infer that the officer was not indifferent. Of those matters, two were of a general nature, and two more especially addressed to the particular case in question. First, it was said, that the officer had selected the names of the jurors, and not taken them by some mode of mere hazard or chance from the freeholders' book. Secondly, that in this selection he had taken those names only which had the addition of Esquire. Thirdly, that among those selected and ultimately retained by him, some were gentlemen acting in the commission of the peace for the county. Fourthly, that the original nomination, comprised several persons, who, as grand jurymen, had found the present indictment; and that although this objection was pointed out to the Master, as soon as it was discovered, that two or three gentlemen whom he had named were of that class, yet he persisted to retain those and to name others, until the solicitor of the treasury, being consulted, consented to abandon them; upon which he struck them all out, and substituted other names in their places. Before the discussion of these points, a preliminary enquiry must be made; and if it shall turn out that there cannot, by law, be any challenge of the array at a trial, on any supposed ground of unindifferency in the officer of the court who has nominated a special jury, the consideration of these points will become immaterial, or material only in another view of the subject.

It cannot be, or at least it has not hitherto been ascertained, at what time the practice of appointing special
juries

juries for trials at nisi prius first began. It probably arose out of the practice of appointing juries for trials at the bar of the courts at *Westminster*, and was introduced for the better administration of justice, and for securing the nomination of jurors duly qualified in all respects for their important office. It certainly prevailed long before the statute 3 G. 2. c. 25., and was recognized and declared by that statute, which refers to the former practice. The whole matter is comprised in the fifteenth and two following sections of the statute. The fifteenth section begins by reciting, that some doubt had been conceived, touching the power of the Courts at *Westminster* to appoint juries to be struck before the clerk of the crown, master of the office, prothonotaries, or other proper officer of the respective courts, for the trial of issues depending in the courts, without the consent of the prosecutor or parties concerned, unless such issues are to be tried at the bar of the same court, and then *declares* and enacts, that it shall be lawful for the Courts, upon motion made on behalf of his majesty, or of any prosecutor or defendant, in any information or indictment for misdemeanor, &c.; or plaintiff or defendant in any action or suit, and the Courts are thereby authorised and required, upon such motion, to order and appoint a jury to be struck before the proper officer of the Courts, in such manner as special juries have been and are usually struck in such Courts, upon trials at bar had in the same Courts; *which said jury, so struck as aforesaid, shall be the jury returned for the trial of the said issue.* The sixteenth section relates only to the costs. The seventeenth section enacts, that when a special jury shall be ordered to be struck, in any cause arising in any city or county of a city, or town, the

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sheriff or undersheriff shall be ordered, by the rule, to bring before the proper officer the books or lists of persons qualified to serve on juries within the same, in like manner as the freeholders' book hath been usually ordered to be brought, in order to the striking of juries for trials at bar, in causes arising in counties at large, and the jury shall be taken and struck out of such books or lists. Upon this statute it may be observed, first, that there is no provision as to the mode of taking and striking the special jury; but that matter is left to the ordinary practice used in cases of trials at bar. 2dly, That there is a positive enactment, that the jury so struck shall be the jury returned for the trial of the issue. And, 3dly, That although the statute contains a provision for the attendance of the sheriff of the county of a city or town, it contains none as to the attendance of the sheriff of a county at large; leaving that to be enforced according to antecedent practice, which may well be supposed have been more perfectly established in the cases of counties at large, than in smaller districts, by reason of its more frequent occurrence. This statute, therefore, must necessarily be understood and construed, in many respects, by reference to the antecedent and existing practice of the Courts. And, notwithstanding all the learning and research that have been bestowed on the present case, on the part of the defendants, not one solitary instance has been found of an offer to challenge the array on the supposed ground of unindifferency in the officer of the Court by whom a jury had been nominated for any trial, either at bar, or at nisi prius, either before or since the statute; although there must have been many occasions, on which it may reasonably be

be presumed, that such a step would have been taken, if it had been thought maintainable.

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In considering the causes of the absence of any such attempt in former times, it will be proper to advert to the circumstances under which a challenge to the array is made in other cases. Such a challenge is always grounded upon some matter personal to the officer by whom the jury has been summoned, and their names arrayed or placed in order upon the parchment or pannel whereon they are returned, in writing, to the Court. Upon trials for felony, this pannel is not in any manner published or made known, until the sitting of the Court, at which the trial takes place; and, therefore, that sitting necessarily furnishes the first opportunity of making any objection to it. Upon other trials, and in the superior courts, there have always, or at least almost universally, been two successive processes to enforce the attendance of the jury. First, A venire returnable in the Court above, at the place of its sitting, and in some day in term. To this process, the sheriff formerly made an actual return of the names of jurors as summoned, but the jurors themselves did not appear. This, therefore, was followed by a second process, more compulsory in its nature, requiring their attendance in the Court, in like manner, on some other day. This process is still issued in its primitive and unqualified form for trials at bar; but, for trials at nisi prius, it contains a clause, inserted by virtue of the ancient statute of nisi prius, qualifying the command for their attendance in the Court above, in case the justices of assize shall, before the day appointed, come into the county at some day and place particularly mentioned. Upon this view of the process, and adverting to that established rule

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which postpones a challenge of the array until the actual appearance of a full jury, it is manifest that no party has an opportunity of making such a challenge until the cause has been actually called on for trial. This, therefore, being the first opportunity, is, in the ordinary course, the proper time and season for such a challenge, where the jury have been impannelled and chosen in the usual way by the sheriff. But as the effect of such a challenge, if allowed, would often be to delay the trial, it became usual for a plaintiff, who anticipated that such a challenge might be effectually made, to apply to the Court, and suggest the objection to the sheriff, and, if this was not denied, the Court directed its process to the coroners of the county instead of the sheriff. And, in case the coroners also were liable to objection, and this was suggested to the Court, then the Court appointed certain persons of its own nomination, called elizors, to whom the process should be directed. And this course of practice is not altogether obsolete at the present time. The coroners, like the sheriff, are general officers, and not the particular officers of the Court; amenable, indeed, to the Court for misconduct, but acting officially under the general authority of the law, and not, like elizors, under the special authority of the Court. The array, therefore, may be challenged for causes of personal objection to the coroners. *But where the process has been directed to elizors, there can be no challenge of the array, Co. Litt. 158. a.; because, saith the author, they were appointed by the Court; but he may have his challenge to the polls. So, likewise, on a writ of right, whereon the sheriff returns to the Court four knights, by whom, after being sworn for this purpose, twelve others are chosen and named in*

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the presence of the parties, to constitute with the same knights the grand assize, or trying jury, consisting of sixteen persons, there cannot, after the pannel is returned by the four, be any challenge, either of the pannel *or of the polls*; though the twelve, before any assent or return of the pannel, may be challenged before the four knights electors. *Co. Litt.* 294. See also *Booth's Real Actions*, p. 97 and 102., 7 *Hen.* 4. fo. 20. Now the nomination of a special jury by the known and general officer of the Court, whether the clerk of the crown or master of the office, or otherwise, is precisely analogous to a nomination by elizors specially appointed by the Court for the particular purpose; and, as the array cannot be challenged in the latter case, I am unable to discover any satisfactory reason for saying, in the absence of all practice and authority, that it may be challenged in the former. The reason for disallowing it holds equally in both cases; *the Court may be applied to*. If there be any reasonable personal objection, known before-hand, the Court will, upon proper application, order the nomination to be made by another officer: if any reasonable objection arises from the conduct of the officer on the particular occasion, the Court, having power over its own rule, at least until every thing shall have been completed under it, can reform and correct, and, if necessary, make a new rule for nomination by another officer, or abrogate the rule entirely, and leave the nomination to the sheriff. If the application be not made, or be refused by the Court as unreasonable, it may well be supposed that no reasonable objection exists, especially when it is considered that the party has the power of striking out twelve names.

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Another reason against allowing such a challenge is, the great inconvenience that would ensue, and the almost utter impossibility of enquiring into the matter satisfactorily at nisi prius. If such a challenge can be allowed in one case, it must be allowed in all, criminal and civil, for the prosecutor and for the defendant. And such challenges may be used as an instrument of delay or vexation at every assizes throughout the kingdom, and must be tried in the absence of the person by whom the pannel has been formed, and consequently without any opportunity of answer or explanation; whereas the sheriff and the coroners are bound by the duty of their office to attend at the assizes, and in fact almost invariably do so.

I have already mentioned, that the practice of nominating jurors under a rule of the courts at *Westminster*, is antecedent to the statute, and confirmed by it; and I must here again notice the concluding words of the 15th section, "which said jury, so struck, shall be the jury returned for trial of the issue." I cannot reconcile that expression to the supposition, that any idea was entertained by the legislature that the jury so struck and returned, that is, the whole pannel and the whole proceeding, should be set aside at nisi prius, at least upon any challenge to the favour. In the case of *The King v. Johnson*, the challenge was on an objection to the sheriff; and the answer, that he was acting under a rule of the Court, could not be satisfactorily given at nisi prius, because the other party was not prepared with the rule of court. This matter appears to have been introduced by way of counterplea to the challenge; and there was a special demurrer to the counterplea, assigning, among other causes, the non-production of the rule,

rule. And, according to the account of the case in the *Crown Circuit Companion*, pp. 105, 6. of the eighth edition, the Judges of *Chester* held the counterplea ill, because the Court there could not take notice of the rule of Court; and Lord *Hardwicke* afterwards said the Judges had done right, because the rule of the Court could not be taken notice of. And this appears to be a more satisfactory reason than that which is mentioned in the report in 2 *Strange*, 1000. (which reason, however, does not apply to the present point), namely, that the sheriff would have the ordering of the names on the pannel. It may be further observed, in support of the reason mentioned in the *Crown Circuit Companion*, that the trial being in *Cheshire*, the jury process did not issue from this Court; but the record was sent by mittimus to the chamberlain of the county palatine, and the jury process issued from the Court of Great Sessions; and the case was tried at the bar of the Court there, in the usual course.

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One other instance only of challenge of the array of a jury nominated under a rule of Court was mentioned, viz. *The King v. Burridge*.^(a) This was before the statute; and it appears to have been thought that the rule of Court could not dispense with the rule of law as to hundredors. It is unnecessary to give any decisive opinion on that point at present; I will therefore only say, that if it be law, great inconvenience may ensue.

We are all, therefore, of opinion, that a challenge to the array cannot be taken at nisi prius for the supposed unindifferency of the officer, by whom the jury was nominated under a rule of Court, according to the statute. Indeed, it stands as a matter of doubt in the books, whether any challenge to the array, which oper-

(a) 1 *Str.* 593.

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ates only as a challenge to the favour, like the present, can be taken against the crown. This being doubtful, I place no reliance upon it. And as these defendants had two entire terms in which they might have applied to this Court, and forbore to do so, unless their objections could prevail as grounds of challenge, they must be of a very plain and cogent nature to induce the Court to listen to them at this stage of the proceedings for the purposes of a new trial, which would be contrary to all rules and analogy of practice. So that it is not absolutely necessary to notice or discuss the particular grounds alleged. But it will be more satisfactory to do so; and I will therefore, for the purpose of considering them, suppose that the array may, in a case like the present, be challenged for alleged unindifferency in the officer who nominated the jury.

The first ground was, that the officer selected the names, and did not take them by some mode of chance or hazard. Now such a mode would be contrary to all precedent and example. Jurymen have always been named by the discretion of some person; of the sheriff, the coroners, or elizors. In special juries, before the statute, they were named by an officer of the Courts; the statute recognizes and confirms the practice in general terms. It is impossible to suppose, that the legislature passed a statute to confirm the practice, without knowing how that practice was conducted; and not less impossible to suppose, that an act of parliament, evidently passed for the purpose of obtaining jurymen of some superior qualification, should be carried into effect by the adoption of a mode that would leave the qualification absolutely to chance. 2dly, The second ground was, that the officer nominated those persons
 only

only whose names had the addition of esquire, or of some higher degree. On a charge of partiality, it is material to consider, whether the act be according to usage and precedent, or a departure from them. And it is well ascertained, that the nomination of gentlemen of this class is according to the general and ancient usage of all the Courts, so that it affords not the slightest evidence of partiality in the particular case. Something like ridicule was attempted to be cast upon this addition of esquire in the freeholders' book, and we were told, that it is the constable who makes the esquire. But how is it that the constable acts in this case under the statute that was referred to? He selects from the rate-book of his parish, the names of persons qualified to serve on juries, and affixes the list on the church-door in the first instance, and afterwards returns it to the quarter sessions, and we must therefore suppose, that he gives to each individual the addition and description by which he is usually known and addressed in his own neighbourhood. But, suppose the constable to give this addition to persons of inferior rank, and to withhold it from those of superior, he may indeed, by so doing, deceive the officer of the Court in some respect, but he will do nothing of which these defendants can complain without inconsistency, because they say, they ought not to be tried by persons above the common degree, and this is the substance of their complaint against the nomination of esquires. Nor is partiality in any degree evidenced by the particular circumstance on which so much stress was laid, namely, the small number of persons having the addition of esquire in the freeholders' book of *Warwickshire*; indeed, that circumstance has a contrary tendency, because by narrowing

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rowing the choice, it shews that the officer looked to a class only, according to the usual practice, and not to the personal character of particular individuals. If he had looked at the latter, he would naturally have taken to himself a larger scope, as furnishing more numerous objects for his selection. It is the very object of a special jury to obtain the return of persons of a somewhat higher station in society, than those who are ordinarily summoned to attend as jurymen at nisi prius. And a similar practice has long prevailed, even in the execution of writs of inquiry of damages, before the sheriff; wherein a party obtains, on application, a rule of the Court, in obedience to which, the sheriff summons persons of a somewhat higher class, than those by whom he is ordinarily attended. This object is accomplished in the mode open to the smallest portion of suspicion or objection, by adverting to the addition placed against the name. And we have no doubt, that the officer has the power of nomination, and of nominating only from the higher classes according to the ancient practice, and that he acts wisely in doing so, unless there be some special reason for adopting a new and different course. In the present instance, we have the affidavit of the officer, stating, that, to the best of his knowledge and belief, he knew not even by name more than two of the persons whose names he put upon the list; that he had not, to the best of his knowledge, ever seen more than one of them, and that one only once; and further, that he knew nothing of or concerning the connections or principles of any of them, by which he was influenced in his nomination; and that he nominated each of them solely, because, in looking indiscriminately over the books, in the manner that he has mentioned, he met with

with his name among that class of persons, from which, according to his opinion, the special jurors have been usually struck.

The third ground of complaint was, that the officer named several gentlemen acting under the commission of the peace for the county. It was said that those gentlemen must be supposed not to be unindifferent between the crown and the defendants, upon this, which was termed a political prosecution, because they hold their office at the pleasure of the crown. I do not exactly know what is meant by a political prosecution; the present, as I collect from the indictment, is a prosecution for a high misdemeanor against the public peace, and the constitution and rights of one branch, at least, of the legislature of the country. It is true, indeed, that justices of the peace hold their office at the pleasure of the crown, but they hold a laborious and burthensome, and not a profitable office; and it is really a gross calumny upon a class of persons, to whom the nation is most peculiarly indebted for valuable and gratuitous services, to suppose that they will not act impartially between the king and his people. If gentlemen of this description should be returned by the sheriff, no challenge could be taken to them individually, as a challenge to the polls, on the ground of their office; it has been the constant practice, to name some gentlemen of this class on special juries, or rather no one has ever thought of omitting them on the nomination. Some of them are constantly returned by the sheriff as grand jurymen; and no man, who wishes well to the country, can wish to see them excluded as a class, and by reason of their office, from any portion of the administration

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nistration of justice, wherein they have been accustomed to take a part.

The last ground of complaint on this head, was the original nomination of some of the gentlemen who had been named on the grand jury, by which this indictment was found. The Master of the Crown Office has informed us, upon his oath, that he did not consider this fact to form a valid objection to their nomination. And taking this, as we are bound to take it, not merely from the particular oath, but from the well known and general honour and integrity of that officer, to be true, it is impossible to say, that, although he might be mistaken in his opinion, he did not act honestly in abiding by it, until the solicitor of the treasury consented to waive the nomination. The nomination was waived and abandoned, and in fact, every name of this description was struck out of the list of 48, and other names substituted, before the list was delivered out to the parties for reduction; so that the defendants sustained no possible prejudice or inconvenience from the intended nomination.

And here I will observe, that this circumstance affords an instance of the utility of the presence of the parties at the time of the nomination of the 48, which we were told would be useless, if the officer might name at his pleasure. For if the parties had not been present, it is probable that some names of this description might have stood among the 48, either from ignorance of the fact, or from the mistaken opinion of want of objection to them. The presence of the parties may enable them, on many occasions, to give useful hints which the officer will adopt, as for instance, the death, absence, or ill health, of a person named in the freeholders' book.

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The only remaining ground of challenge to the array was, the supposed unindifferency of the sheriff; and this was to be manifested by the supposed omission to summon one of the gentlemen named in the pannel of the special jury. This was treated as a challenge to the favour for unindifferency. It could not be a ground of principal challenge, according to any authority. Considering it as evidence of partiality, let us see how the fact stands. The under-sheriff directed the summons of this gentleman, at the same time and manner as of the others named in the pannel. The inferior officer, whose duty it was to serve the summons, sent it in a very negligent and blameable manner, together with a summons in some other causes, by a carrier or newsman, instead of taking it himself. This was done without the privity of the high sheriff, or his under-sheriff. How, then, can it lead to any inference of partiality in the mind of either of those officers? But, further, how were the defendants prejudiced by it? Mr. *Peach*, the gentleman in question, appears, by the affidavits before us, to have been long in an infirm state of health; to have been summoned, either as a grand or special jurymen, to every assizes at *Warwick*, for the last eight years, and never once to have attended; and to have been summoned to this very assize, in due time, on some other cause, but not to have obeyed that summons. So that, upon the whole, we must conclude, that, at whatever time or manner summoned for the present trial, this gentleman would have availed himself of that excuse for absence which the state of his health afforded. It is, therefore, really absurd, to treat this neglect of the inferior officer, as furnishing evidence of partiality in the sheriff to sustain a challenge of the array on that ground, or as an inducement to this Court to grant a new trial.

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Ramesse.

The last ground of the motion for a new trial, was the refusal of what has been called a challenge to the polls, in the case of the special jurymen. This challenge was made on the ground of opinions supposed to have been expressed by those gentlemen hostile to the defendants and their cause. There was no offer to prove such an expression, by any extrinsic evidence, but it was proposed to obtain the proof, by questions put to the jurymen themselves. The Lord Chief Baron refused to allow such questions to be answered; and, in our opinion, he was right in this refusal. It is true, indeed, that he permitted similar questions to be answered by the talesmen; but in so doing, we think he acted under a mistake. It does not appear, distinctly, in what precise form the question was propounded; but, in order to make the answer available to any purpose, if it could have been received, it must have been calculated to shew an expression of hostility to the defendants, or some of them, a pre-conceived opinion of their personal guilt, or a determination to find them guilty; any thing short of this would have been altogether irrelevant. The language of Mr. Serjeant *Hawkins* upon this subject, *Lib. 2. c. 48. s. 28.*, is, that if the jurymen "hath declared his opinion beforehand, that the party is guilty, or will be hanged, or the like, yet if it shall appear that the juror hath made such declaration from his knowledge of the cause, and not out of any ill-will to the party, it is no cause of challenge." So that, in the opinion of this learned writer, the declaration of a jurymen will not be a good cause of challenge, unless it be made in terms or under circumstances denoting an ill intention towards the party challenging. A knowledge of certain facts and an opinion that those facts constitute a crime, are certainly no grounds of challenge, for it is

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clearly settled, that a juryman cannot be challenged by reason of his having pronounced a verdict of guilty against another person charged by the same indictment. (a) In *Brook, Challenge*, pl. 90. it is thus stated: It is a good challenge, to say that a juryman has reported; that if he be impannelled, he will pass for the plaintiff; and 21 *Hen. 7.* 29. is referred to. *Ibid. Challenge*, 55. Another juryman was challenged for favour, in a suit of replevin; *Babington*; if he has said twenty times that he will pass with the one party for the knowledge that he has of the matter and of the truth, he is indifferent; but if he has said so for any affection of the party, he is favourable, and he charged the triers accordingly; and 7 *Hen. 6.* fo. 25. is cited. In *Fitz. Chall.* 22., the opinion of *Babington* is thus given: "If he will pass for one party, whether the matter be true or false, he is favourable; so, if he has said that he will pass for one party, if it be for affection that he has to the person, and not for the truth of the matter, he is favourable; but if it be for the truth of the matter that he has knowledge of it, he is not favourable; wherefore you will enquire according to what I have said." The charge of *Babington* to the triers, as given in the *Year-book*, 7 *Hen. 6.* fo. 25. is thus. Addressing himself to the triers, he says; "If, whether the matter be true or false, he will pass for the one or the other, in that case he is favourable; but if a man has said twenty times that he will pass for the one or the other, you will enquire, on your oaths, whether the cause be for affection that he has to the party, or for the knowledge he has of the matter in issue; if for affection that he

(a) See *P. Cook's case*, 13 *St. Tr.* 313., and 7th resolution in the case of the *Regicides*, 5 *St. Tr.* 985., and *Cramburne's case*, 13 *St. Tr.* 221. *Howell's edition*.

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has to the party, then he is favourable, but otherwise not; and if he has more affection to one than to the other; but if he has a full knowledge of the matter in issue, if he be sworn, he will speak the truth, notwithstanding the affection he has for the party, then he is not favourable." Again, *Bro. pl. 90.* By *Frowick J.*; "Not sufficient of freehold is a good challenge; and upon this the party himself shall be sworn, whether he has sufficient or not." In the 49 *Edw. 3. fo. 1.*, it appears, that some of the jurors were challenged, for that they had declared the right of one party or of the other beforehand, or given their verdict beforehand, and some for that they were of counsel with one party or the other, and of their fees: and mesmes les persons, that is the persons themselves, were sworn to speak the truth, where the challenge did not go to their reproof or shame; but those who were challenged, for that they had taken of the party, or procured without taking, were not sworn on the voir dire to give evidence to the triers.

These ancient authorities shew, that expressions used by a juryman are not a cause of challenge, unless they are to be referred to something of personal ill-will towards the party challenging; and also, that the juryman himself is not to be sworn, where the cause of challenge tends to his dishonour; and, to be sure, it is a very dishonourable thing for a man to express ill-will towards a person accused of a crime, in regard to the matter of his accusation. And accordingly, we find it established in later times, namely, at the trial of *Peter Cook (a)*, in the eighth of King *William the Third*, that such questions are not to be put to the juror himself. So

(a) 13 *St. Tr.* 354., *Howell.*

that

that all the authority in the law on this head is against the defendants, and shews, that the refusal of the Lord Chief Baron to allow the proposed questions to be answered by the pECIAL jurymen, was most proper and agreeable to law. Upon the whole matter, we all think that the rule for a new trial must be discharged.

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Rule discharged. (a)

(a) In *P. Cook's case*, 13 St. Tr. 339., the prisoner having asked one of the petty jury on the voir dire, whether he were one of the grand jury that found the bill, *Treby C. J.* said it was a very proper question; "for an indictor ought not to be a trier."

NEWINGTON *against* KEEYS.

Friday,
May 25th.

ASSUMPSIT for money lent and advanced, money paid, money had and received, and upon an account stated. Plea: as to all the counts, except the count for money paid, the general issue, and as to that count, defendant pleaded, that, on the 27th *January*, 1814, at, &c. he became a bankrupt, and that before the commencement of the suit, and after the 49 G. 3., to wit, on the day and year aforesaid, a commission issued against him, upon which he was duly declared a bankrupt. And that, on the 1st *April*, 1814, he obtained his certificate, which was allowed by the Chancellor on the 13th *February*, 1815. The plea then stated, that before the issuing of the commission, and before the committing of any act of bankruptcy, the plaintiff became bail for the defendant in a certain action of *Jones and Others, v. Keeys*, and afterwards, to wit, in *Trinity* term, 1813, entered into a recognizance in the Court of King's Bench, that, "if the said defendant

Bail above are not sureties or persons liable for the debt of a bankrupt within 49 G. 3. c. 121. s. 8.

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should

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should happen to be convicted in the said plea, then, that all such damages as should be adjudged unto the said *Jones and Others*, in that behalf, should be made of his lands and chattels, and levied to the use of the said *Jones and Others*, if it should happen that the said defendant should not pay the said damages, or render himself on that occasion." The plea then stated, that, in *Hilary* term, 1814, judgment was recovered against the defendant in the action, *Jones and Others, v. Keeyes*, with 147*l.* damages, and that the defendant did not pay those damages, or render himself on that occasion, according to the form and effect of the said recognizance. And that thereupon such further proceedings were had, that, after the issuing of the said commission, and before the defendant obtained his certificate, to wit, on 6th *November*, 1814, the plaintiff, as one of such bail, became, and was, according to the course and practice of the said Court, obliged to pay, and actually did pay the sum of money, in the said second count mentioned, to the said *Jones and Others*, for, and on account of the said damages. Replication, that the said *Jones and Others* did not obtain judgment in their action, until after the time of the issuing the commission of bankruptcy against the defendant. Demurrer and joinder.

Parke in support of the demurrer. The question here is, whether bail above be a surety within 49 G. 3. c. 121. s. 8. By that section, all sureties, or persons liable for any debt of the bankrupt, may prove under the commission. If they can prove, the debt is of course barred by the certificate. Now, that statute being a remedial law, ought to have a liberal construction given to it, and so it was laid down by the Court in *Wood v. Dodgson*.

Dodgson. (a) Here the bail are substantially sureties for the debt, and they have been compelled to pay it. The bankrupt's estate has thereby been released from any claim by *Jones* and *Others* on it. Accommodation acceptors or drawers have been held to be sureties within this clause. In *Hewes v. Mott* (b), the Court of Common Pleas held bail to the sheriff not within the act. But there the bail bond is entered into with the sheriff. Here the recognizance is entered into with the original creditors.

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Tindal contra. Judgment not having been obtained when the commission issued, it is impossible to say for what debt the bail were then liable. How can it be ascertained, whether they will ever be liable. The principal may render in their discharge. He was then stopped by the Court.

ABBOTT C. J. The recognizance of bail is in the alternative, to pay the damages in case the principal does not pay them or render himself. In cases which have been decided to fall within this clause, the parties could only pay the debt, in case the principal did not do so, and that is the material distinction. If the legislature intended to include bail, it would have been easy to have done so, by only adding the words, "or bail," which would have removed all difficulty. In the absence of such words, I am of opinion, that the bail in this case are not sureties within the meaning of the 49 G. 3. c. 121. s. 8. There must, therefore, be judgment for the plaintiff.

Judgment for the plaintiff.

(a) 2 M. & S. 195.

(b) 6 Term. 322, 3 March. 1821.

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Saturday,
May 26th.

The KING *against* The Mayor of MONMOUTH.

A mandamus to the mayor of *M.* to convene a meeting, to proceed to an election, in order to fill up five vacancies in a select body, consisting of fifteen chief burgesses. Return by him, after stating objections to the titles of several of the remaining burgesses, that there were not within the borough eight legally elected chief burgesses, by whom the election of others could be made, and that, for the several reasons before mentioned, he could not proceed to such election: Held insufficient return, and peremptory mandamus awarded.

THIS was a mandamus to the mayor of the borough of *Monmouth*, reciting a charter of the 3 Jac. 1. granting to the mayor, bailiffs, and commonalty of the said borough, and their successors, "that there should for the future be fifteen of the most discreet of the burgesses to be named chief burgesses, and to form the common council, for the good order and government of the said borough; and that whensoever it should happen that any one or more of the aforesaid chief burgesses of the said borough should die or be amoved from their offices, or the said chief burgesses, or any one of them, not well conducting themselves, should, for that cause, or any other reasonable cause, become amoveable, that then it should be lawful for the aforesaid mayor and chief burgesses of the borough aforesaid for the time being, then surviving or remaining, or the major part of them (of whom the mayor of the borough aforesaid to be ne), one other or others of the burgesses of the borough aforesaid, into the place or places of the said chief burgess or burgesses so happening to die or be amoved, to elect, nominate, and appoint, to supply the number of the fifteen chief burgesses of the borough aforesaid." The mandamus then stated, that the offices of five of the aforesaid chief burgesses of the said borough were vacant, and commanded the mayor, in the usual manner, to convene a meeting to supply the vacancies. The return of the mayor, after stating objections to the titles of several persons who claimed to be chief burgesses of the borough, concluded as follows:

"And

“ And I do hereby further certify and return, that there are not now, within the said borough, eight legally elected chief burgesses of the number of the fifteen chief burgesses of the said borough, by whom, or by a majority of whom, the election of chief burgesses of the said borough can be made, as by the within-recited charter is directed; and, lastly, I do hereby further certify and return, that, for the several reasons before mentioned, I cannot proceed to such election of chief burgesses of the said borough, and to do such other things as by the within writ I am commanded.”

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against
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Monmouth.

Campbell, in support of the return, allowed that some of the reasons it contained for not proceeding to the election were untenable; but contended it was sufficient, if enough appeared on the face of the return to shew that an election could not legally have taken place, *Rex v. Archbishop of York*. (a) And here, according to *Rex v. Bellringer* (b), an election of capital burgesses in this borough could not take place, except by a majority of the whole body, as originally formed; and the mayor has expressly made a return, on which a traverse may be taken, that there are not now eight chief burgesses by whom the election could be made. But

The Court said, that, supposing a majority of the whole body were requisite to make the election, the return was bad; for the mayor says there are not, within the borough, eight legally elected chief burgesses. Now, although there may not be eight who were legally elected, there may be some who were not legally elected, but whose titles are now unimpeachable from

(a) 6 T. R. 493.

(b) 4 T. R. 810.

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against
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lapse of time, so as to leave a majority of the whole body qualified to proceed to the election.

Return quashed, and peremptory mandamus to issue.

W. E. Taunton was to have argued on the other side.

Saturday,
May 26th.

The KING *against* The Inhabitants of LEEDS.

By stat. 59 G. 3.
c. 12. s. 33.
the wife and
eight uneman-
cipated children
of a *Scotchman*,
who has not
acquired any
settlement in
England, must,
if chargeable,
be sent by a
pass along with
the husband to
Scotland, and
cannot be re-
moved to the
maiden settle-
ment of the
wife.

TWO justices, by their order, removed *Hannah*, the wife of *Thomas Robinson*, and *Thomas, Hannah*, and *Elizabeth*, her children, from the township of *Leeds* to the township of *Almondbury*, both in the West Riding of the county of *York*. The sessions, upon appeal, discharged the order, subject to the opinion of this Court upon the following case. *Thomas Robinson*, the husband of *Hannah Robinson*, was a *Scotchman*, residing at *Leeds* with his family, and had not acquired any settlement in *England*. Not being able to maintain his wife and children, they were obliged to apply for relief to the township of *Leeds*, and were actually chargeable to that township at the time of granting the order of removal. Under these circumstances, he consented that his wife and children should be removed to *Almondbury*, which was the place of his wife's maiden settlement. It was objected, by the counsel for the appellants, that by the statute 59 G. 3. c. 12. s. 33. the wife and family (the children not having gained any settlement in their own right,) could not be sent by an order of removal to her maiden settlement, but ought to be sent by a pass under that act, along with the husband, to *Scotland*. The sessions were of that opinion, and accordingly discharged the order of removal,

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E. Alderson, in support of the order of sessions. The right of removal to the wife's maiden settlement, when the husband is residing with her, is only to be allowed in cases where he is himself irremovable, because it ought to go no further than necessity absolutely requires, it being contrary to sound policy to permit such separations to take place. Here the act of parliament, 59 G. 3. c. 12. s. 33., has expressly made him removable to *Scotland*, and it would follow, therefore, from that circumstance alone, that his wife and family must go with him, and that they are not removable any longer, even with consent, to her maiden settlement. But here the act of parliament goes much further, for the wife and family are expressly mentioned in it. It provides, that, upon complaint of the churchwardens, that a person born in *Scotland* hath become chargeable, by himself or his family, the justices are to cause him to come before them, and to examine him as to the place of his birth or last legal settlement, and whether he or any of his children hath or have gained any settlement in *England*. Now the object of this is simply to ascertain whether he has any settlement to which he may be removed, and whether any of his children have gained one; because, if so, they are not part of his family. Then, if they find that *he* has not gained any settlement in *England*, the act says they shall remove him, his wife, and such of his children as have not gained a settlement, (in other words, him and his family,) by a pass into *Scotland*. For the gaining a settlement is one of the modes of emancipation; and the act, therefore, when it uses that expression, means only all unemancipated children. It is to be observed, that no mention is made throughout of any enquiry into the wife's settlement, which would not have been omitted, if the removal of her

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her and the family to such place were in the contemplation of the legislature. If this construction be not adopted, great inconvenience may follow. A man, after consenting to the removal of his wife to a neighbouring parish, may then be sent off to *Scotland*, and so separated altogether. And the parish to which the removal of the wife and family takes place, not having the husband present, cannot put the act in force. So that, as to them, the act would be altogether repealed.

Scarlett and Bolland, contra. It was settled in *Rex v. Eltham (a)*, that the wife and children may, where the husband has gained no settlement in *England*, be removed by his consent to her maiden settlement. And the act 59 G. 3. c. 12. s. 33. is not imperative on the magistrates, but gives them a discretion as to whether they will remove the wife and children, with the husband's consent, to her maiden settlement, or send them, with him, into *Scotland*. And where so serious and important a power as that of sending a whole family out of the kingdom, is to be given, it is fit that there should be a discretionary power vested in the magistrates, to prevent the hardships which otherwise would occur. The words are only, that the said justices "shall, and they are hereby empowered;" which are not imperative. Here the children have settlements by birth in *England*. And, therefore, they, at all events, cannot be removed. Besides, it would be very hard, if a young man, born in *England*, and perhaps of age, but still residing in his father's family, might, because he was unemancipated, be sent off into *Scotland* or *Ireland*, where he might be altogether destitute of the means of

(a) 5 East, 113.

support. The Court will not adopt a construction of the act of parliament, which would compel magistrates to inflict such hardships upon individuals.

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ABBOTT C. J. This question arises out of the compulsory power formerly vested in justices of peace, of removing a wife from her husband, by consent: and it is one, and that not the smallest of the evils attendant on the poor-laws, that cases should have arisen under them, in which this Court has held, that such a removal, amounting to a temporary divorce, might lawfully be made. It is to be observed, however, that in *Rex v. Eltham* there was the consent of both husband and wife to the separation. I am very glad that we are relieved by this act of parliament from the necessity of considering those cases. I think it is impossible to read the words of the thirty-third clause without seeing that the magistrates have now the power, in cases like the present, of sending the husband, together with his wife and family, by a pass to *Scotland*; and, having this power, I am of opinion that they cannot now remove the wife and family to her maiden settlement, so as to separate her from her husband. I think, therefore, that the order of sessions was right, and ought to be confirmed.

BAYLEY J. I am of the same opinion. It is against public policy and good morals, to permit the separation of husband and wife, even with their consent. This question, however, turns on the construction of 59 G. 3. c. 12. s. 33., which enacts, that it shall and may be lawful for the magistrates, and they are thereby required, in certain specified cases, to cause persons born in *Scotland*, &c. to be brought before them. Now these
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are words of compulsion on the magistrates to institute proceedings in cases like the present. The act then provides, that the justices shall enquire into the settlement of the head of the family and his or her children, in order, as it seems to me, to ascertain whether any of those children have been emancipated. It then enacts, that such justices shall and are thereby empowered to cause such poor person, his *wife*, and such of his children as have not gained a settlement in *England*, to be removed by a pass to *Scotland*. Now it is to be observed, that the wife is thus, for the first time, introduced in the latter part of this clause, which is perfectly silent in the prior part of it, as to any enquiry to be made by the justices respecting her settlement. I think, therefore, that the magistrates have no discretion given to them of removing the wife to her maiden settlement, and thereby of separating her and her family from the husband. If the magistrates remove at all, they must remove the whole family together to *Scotland*, under the provisions of this act of parliament.

HOLROYD J. I am of the same opinion. The words of this clause are imperative on the magistrates, in case they make any order, to remove the whole family to *Scotland*, and not, as they have done here, to remove the wife and family to the place of her maiden settlement. By the act, if the husband becomes chargeable by himself, or his family, he may be removed; and, it seems to me, that it is altogether immaterial, provided the head of the family be born in *Scotland*, whether the children be born in *England* or not. The only exception is as to those children who have gained settlements in *England* in their own right. Then, as a power is
now

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now given to remove the husband, the wife must be removed with him; for the power of removing her to her maiden settlement was allowed to exist only from the necessity of the case, and must cease with it. It seems to me, that we cannot narrow the construction of the words of this statute, unless, in so doing, we clearly saw that we should further the intention of the legislature. And as I do not think that their intention was to prevent the removal of the whole family together, I am of opinion that the decision of the sessions was right.

BEST J. If the point decided in *Rex v. Ektham* were to occur again, I think it would perhaps be worth considering whether that decision could be supported. It is, however, not necessary to determine that question now, because I am clearly of opinion, that, under the clause of this act of parliament, it is imperative on the magistrates to remove the whole family to *Scotland*. It seems to me, that clearer terms could not have been used. For the act expressly says, "that the magistrates shall, and they are hereby empowered, to remove such poor person, his wife, and such of his children as have not gained a settlement, to the place of his birth or last legal settlement." The statute could not, therefore, mean to leave a discretion in the magistrates as to whether they would exercise this power or not. And by adopting this construction, we shall, as it seems to me, further the object of the statute, which was to remove the inconvenience which existed from idle and improvident persons coming to this country, and remaining here irremovable with their wives and families. Any other construction would produce great inconvenience. It is quite clear, that the head of the family may be removed;
and

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and if he should be removed, after the separation from his family, the wife and children would, in all probability, remain permanently chargeable.

Order of Sessions confirmed.

Saturday,
May 26th.

The KING against The Inhabitants of MAN-
CHESTER.

A room in a parish work-house, licensed pursuant to 13 G. 3 c. 82., and appropriated to the reception of and used for the purpose of delivery of pregnant women resident within the parish, whether settled there or elsewhere, and the expence of which room was defrayed, in common with the general expences of the work-house, out of the parish rates, is not an hospital or place within the 13 G. 3. c. 82. s. 3.

TWO justices, by their order, removed *Margaret*, the wife of *James Crocker*, and her two children; *Ellen*, aged eight years, and *James*, aged six weeks, from the township of *Manchester*, to the parish of *St. Andrews, Canterbury*. The sessions, upon appeal, confirmed the order as to *Margaret Crocker* and *Ellen*, her daughter, and quashed it as far as it respected *James*, the son; subject, as to the settlement of the said *James*, to the opinion of the Court of King's Bench, on the following case. In the *Manchester* workhouse, there is a room for which a licence has been obtained, as for an hospital, or place for the reception of lying-in women. This room has been duly licensed, pursuant to the provisions of the statute 13 Geo. 3. c. 82., provided, that, under the circumstances, it is such a place as can be duly licensed within the meaning of that act. The room is appropriated, by the officers of the town of *Manchester*, to the reception of women resident within the township, but settled elsewhere, and pregnant with children likely to be born bastards, and also to the reception of pregnant women chargeable to the township, and settled in *Manchester*; and in some few instances, pregnant women have

have been received from other districts, upon a compensation paid to the overseers of *Manchester* by the overseers of the place in which such pregnant women were resident, in respect of the accommodation afforded. Women in the situation above described, having settlements elsewhere than in *Manchester*, if too far advanced in pregnancy, to be safely removed to their settlements, are placed by the town's officers in this room, for the purpose of being delivered. The expenses incurred in respect of the room are defrayed, in common with the general expenses of the workhouse, out of the parish rates. *Mary Crocker* being settled in the parish of *St. Andrew's, Canterbury*, but resident within the township of *Manchester*, and pregnant with a child likely to be born a bastard, was placed, by the officers of the town of *Manchester*, in the above-mentioned room in the workhouse, and was there delivered of the pauper, *James*, who was born a bastard. The question for the opinion of the Court was, whether the above-mentioned room is a hospital, or place within the meaning of the act of parliament referred to, and whether, by force of that act, the settlement of *James Crocker* is in the parish of *St. Andrew's*, or whether it is in the township of *Manchester*.

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Coltman, in support of the order of sessions, was stopped by the Court.

Williams and *Starkie*, contra. The question here is, whether this be not within 13 G. 3. c. 82. s. 5., and that will depend upon the opinion of the Court, whether the room mentioned in the case be an hospital and place within the meaning of the third section of that act.

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Now the act ought to have a liberal construction, being a highly remedial law. It is stated in the preamble, that such hospitals and places, established for the charitable reception of pregnant women, have afforded great relief, and merit every support and encouragement; and the third section is not confined to hospitals, &c. for the public reception of pregnant women, and supported by charitable contribution, but extends to all other hospitals, houses, or places, that might thereafter be established in like manner, and for the like purpose. Here a licence has been regularly obtained, and this is a place maintained by the public contribution of the parish, and may therefore be considered as supported by charitable contribution.

ABBOTT C. J. It seems to me, that in this case we cannot consider this as an hospital or place, within the act. By the tenth section, the person having the management of it is directed, before the admission of any pregnant woman into such hospital, to take her before a justice, to be examined whether she be married or single; and other duties are cast upon them for that purpose. By the fourth section, an inscription is to be placed over the door or public entrance of every such hospital, stating, that it is licensed for the public reception of pregnant women; and the places spoken of in the third section are those used for the public reception of pregnant women, and supported by voluntary contribution. In the present case, it is only a room set apart for this purpose in the workhouse, the expenses of which are defrayed out of the poor's rate. I think, therefore, that this cannot be said to be used for the public reception of pregnant women, nor supported by chari-

charitable contribution. The township, therefore, is not protected by the 5th section; and the sessions have come to a right conclusion.

Order of Sessions confirmed.

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The KING *against* WOODMAN and Others.

*Saturday,
May 26th.*

THE parish of *Morpeth*, in *Northumberland*, consists of several separate and distinct townships, each of which has its own overseers, and maintains its own poor. One of them is the town of *Morpeth*. Beyond the period of living memory, the church and parish affairs of the *parish* of *Morpeth* have been managed by a select vestry, consisting of 24 persons, of whom 16 have been taken from inhabitants of the town of *Morpeth*, and the remaining eight from the farmers in the country parts of the parish. The inhabitants constituting the select vestry have generally continued in office for life, unless they happened to leave the parish or decline to serve. In case of vacancy, the place of a town's member has been usually filled up by the remaining 15 belonging to the town, and the place of a country member by the remaining seven belonging to the country part of the parish; or as many of each set as may happen to be present on such occasions. None of the inhabitants, besides the 24, and the rector or curate, ever attended these vestry meetings. On the 19th of *March*, 1820, a notice signed by the churchwardens and overseers of the township of *Morpeth* was duly given, stating, that a meeting of the gentlemen of the 24 acting for the township of *Morpeth* would be held on

A select vestry for the management of the parish affairs existing by ancient custom, cannot elect another select vestry for the management of the poor within the 59 G. & c. 12.

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the 4th *April*, for the establishing of a select vestry for the concerns of the poor of the township of *Morpeth*, and on the 4th *April* a meeting was accordingly held by 12 of the 16 persons acting for the township of *Morpeth*; at which meeting the defendant and 19 other substantial householders or occupiers within the township were nominated and elected to be members of such select vestry, and an order of a magistrate was subsequently made, by which such 20 persons were appointed to act as a select vestry, for the care and management of the poor of the township of *Morpeth*. This order having been removed into this Court, a rule nisi was obtained for quashing it, on the ground, that the persons appointed to constitute this select vestry were not chosen according to the provisions of the statute 59 G. 3. c. 12. at any general meeting in vestry of the inhabitants of the township, but at a meeting of a select body only. These several facts having been disclosed upon affidavits,

Scarlett and *Littledale* now shewed cause. By the 59 G. 3. c. 12., the inhabitants of any parish in vestry assembled are empowered to establish a select vestry for the concerns of the poor of such parish, and to nominate and elect in the same or any subsequent vestry substantial householders or occupiers not exceeding 20, nor less than five, as shall in any such vestry be thought to be fit members of the select vestry. In general, all the inhabitants of a parish have a right to vote in any matter relating to the management of the parish concerns. By custom, however, this right may be transferred to a select number of the parishoners; and in this particular instance, 16 persons constituted a
select

select vestry for the general management of the concerns of the township of *Morpeth*: they alone composed the vestry of that township: the other inhabitants would not constitute a legal vestry; and then by section 36. of this act it is expressly provided, "that nothing therein contained shall be construed to alter, affect, or disturb any select vestry, which in any parish has been established and acted upon by virtue of any ancient usage or custom." The words, "inhabitants of the parish in vestry assembled," contained in the first section, must be construed with reference to this provision, and must mean such of the inhabitants of the parish as constitute the legal vestry of the parish. If it be not so construed, the township of *Morpeth*, and all other places where by immemorial custom a select vestry has been established, will be deprived of the benefit of this act of parliament, because in such cases the inhabitants at large would not constitute a legal vestry.

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Hullock Serjt., contra, was stopped by the Court.

ABBOTT C. J. I am clearly of opinion, that the sixteen persons who constituted the ancient select vestry for the township of *Morpeth* cannot be considered the inhabitants of the parish in vestry assembled within the meaning of the 59 *Geo. 3. c. 12.* The power to appoint a select vestry is expressly given to the *inhabitants* in vestry assembled; and here it was exercised, not by the inhabitants in vestry assembled, but by certain persons possessing some of the powers of the inhabitants in vestry assembled. It is not necessary in this case to decide what the inhabitants may do; but I have no difficulty in saying that, in my opinion, the inhabitants at large may assemble and appoint a select vestry for

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the care and management of the poor, not interfering with any of the rights of the ancient select vestry. The rule for quashing the order must therefore be made absolute.

Rule absolute.

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The King against TURNER.

A licensed auctioneer going from town to town in a public stage-coach, and sending goods by public waggons, and selling the same on commission, by retail or by auction, at the different towns, is a trading person within the meaning of the 50 G. 3. c. 41. s. 6., and must take out a hawker's and pedlar's licence.

THIS was a conviction of the defendant, under the hawkers' and pedlars' act, 50 Geo. 3. c. 41. The offence charged in the information was, that the defendant, heretofore, to wit, on, &c., at, &c., was a *pedlar and trading* person, going from town to town, travelling with horses, exposing to sale goods; and that he did, on the day and in the year last aforesaid, as a pedlar and trading person, go from town to town, travelling with horses at, &c.; and did then and there, as a pedlar and trading person, going from town to town, and travelling with horses, expose to sale goods, to wit, china, &c. The defendant having appealed against this conviction, the sessions confirmed it, subject to the opinion of this Court, on the following case.

The defendant had no hawker's licence, but was a licensed auctioneer, having only two usual places of abode, the one at *Bath* and the other at *Cheltenham*. At *Cheltenham* he was the agent for the real workers or makers of the goods, for the purpose of selling such goods, as well by private contract as by public auction. The real workers or makers of the several goods mentioned were not in partnership, but were distinct employers of the defendant, for the sale of their several property. In the beginning of the month

month of *March*, 1820, certain goods, consisting of cabinet-ware, &c., were sent by the several real workers, or makers of them, to the defendant, at *Cheltenham*, with a request from them, that he would cause the same to be conveyed by public carriers' waggons from *Cheltenham* to the city of *Worcester*, and would himself proceed thither in order to sell the same there by public auction; and in case the whole of such goods should not be there sold, that he would cause the same to be conveyed by public carriers' waggons from *Worcester* to *Gloucester*, and would himself proceed to *Gloucester*, in order to sell the same there by public auction. The defendant, in compliance with this request, caused the goods to be conveyed by public carriers' waggons from *Cheltenham* to *Worcester*, and proceeded himself to *Worcester* some part of the way in a common stage-coach, drawn by four horses, and the other part of the way in a post-chaise, and when at *Worcester* exposed the goods for sale by public auction, and sold many of them by public auction to different persons. Shortly after the sale at *Worcester*, the defendant caused such part of the goods as were not sold at *Worcester* to be similarly conveyed to *Gloucester*, and proceeded thither himself by a stage-coach; and when at *Gloucester*, exposed such goods for sale by public auction, and sold many of them by public auction to different persons. The whole of the goods belonged to the real workers or makers of them, the defendant not having any property therein; and the whole expenses of removing the goods from place to place were allowed to him in his account with the real workers or makers. The defendant paid regularly the auction duty upon such sales, which, together with the usual commissions, was allowed to him in his

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account with the real workers or makers of the goods. At the time of the sales, neither the real workers or makers of the goods, or of any part thereof, or their children, apprentices, or known agents or servants usually residing with them, were present in *Worcester* or *Gloucester*, nor were *Worcester* or *Gloucester*, or either of them, an usual place or places of abode of any of the real workers or makers of the goods. The defendant was not the known agent or servant usually residing with the real workers or makers of such goods, or with any of them; nor was he a householder either at *Worcester* or *Gloucester*.

Shutt and *Manley*, in support of the order of sessions. The conviction is founded upon the 50 Geo. 3. c. 41. By the 6th section there is imposed an annual duty of 4*l.* upon every hawker, pedlar, petty chapman, and every other trading person going from town to town, or to other men's houses, and travelling either on foot or with horses, or carrying to sell, or exposing to sale any goods, &c. Now the defendant in this case was a trading person, going from town to town, travelling with horses, and exposing goods for sale. It is true, that perhaps he may not be a trader within the meaning of the bankrupt laws, yet, as an agent selling goods on commission, he is a trading person within the meaning of this act of parliament. By section 19., every person trading with a borrowed licence incurs a penalty of 40*l.*, except servants travelling for a licensed master, with the licence of such master, and for his benefit. This exception clearly shews, that the legislature considered that a stipendiary servant would be subject to the penalty of 10*l.*, as a trading person, within the sixth section,

section, if he travelled without a licence; à fortiori therefore, a person selling by commission is within the meaning of this section. So, by section 23., the real makers of goods, or their agents or servants residing with them, are specially excepted. Now that exception would be unnecessary, if other agents were not meant to be included in the act. An agent, therefore, selling goods on commission, and otherwise answering the description mentioned in the act, is a trading person bound to take out the licence required by the tenth section. The seventeenth section imposes a penalty of 10% upon every such hawker, pedlar, petty chapman, or other trading person so travelling as aforesaid, who shall trade as aforesaid without a licence. The words "trade as aforesaid" are sufficiently satisfied, by the fact of the defendant's having exposed goods to sale; for by the sixth section any trading person going from town to town, and carrying to sell or exposing to sale, is liable to pay the annual duty.

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Scarlett and Russell, contra. The conviction here is for travelling with horses; and as such statement is inserted in the conviction, it must be taken to mean a travelling with horses within the act, namely, with horses for which the defendant might have taken out a licence, as required by the acts. But the facts of the case negative such statement, as they shew that the defendant travelled in a public stage-coach, drawn by four horses; for which, of course, it cannot be contended that he should have taken out a licence. The conviction, therefore, cannot be supported in its present form. But the defendant does not come within the words of the act, either as a hawker, pedlar, or other trading

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trading person. Hawkers are described in the statutes 25 *H. 8. c. 9.* and 33 *H. 8. c. 4.*; and it appears from thence, and from the mention made of them in other places, that they have always been considered as itinerant traders of low degree. It cannot be contended that the present defendant is a hawker; he is not convicted for being a hawker, but for being a pedlar and trading person. Now "pedlar" means nothing more than a petty dealer; and the quantity and value of the goods entrusted to the care of the defendant clearly shew that he does not come within that description; neither does he come within the words "other trading person." A trader is a person who seeks his livelihood by buying and selling; whereas this defendant only sold the goods of others on commission. Besides, the words "other trading person" must mean persons ejusdem generis with hawkers, pedlars, and petty chapmen; for it is a general rule in the construction of statutes, that where things of an inferior degree are first mentioned, those of a higher dignity shall not be included under general subsequent words, 2 *Hawk. c. 27. s. 124.* And an auctioneer who, as in this case, sells goods of large value on commission is a person of a different description from a hawker or pedlar, and of higher degree. By section 14. it is enacted, "That every person to whom a licence shall be granted, shall cause to be written on the most conspicuous part of every pack, box, bag, trunk, case, cart or waggon, or other vehicle of conveyance in which he shall carry his goods, the words 'licensed hawker.'" This evidently applies to the case of a person who conveys goods from place to place in his own cart or waggon, and not to one where the goods are conveyed by a common stage waggon. It is

is further to be observed, that by section 7. of the act, any person travelling as a hawker, &c., or other trading person, and selling by auction, is subjected to a penalty of 50*l.*; therefore, if it should be holden that the present defendant comes within that description, he will in many instances be prevented from acting in his character of an auctioneer.

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ABBOTT C. J. The question intended to be submitted to us by the sessions is, whether a licensed auctioneer, conveying goods by a public stage waggon from place to place, and selling them on commission, is to be considered as a pedlar or trading person within the meaning of the 50 *Geo. 3. c. 41.* By section 6. it is enacted, "That there shall be paid an annual duty of 4*l.* by every hawker, pedlar, petty chapman, and every other trading person going from town to town, or to other men's houses, and travelling either on foot or with horses, or otherwise carrying to sell or exposing to sale any goods," &c.; and a further duty of 4*l.* in respect of every horse or other beast bearing or drawing burden. Now, it appears to me that the appellant is a trading person within the meaning of this section. It has been urged that he is not a trader, but an agent selling the goods of others on commission. It is clear, however, that agents were meant to be included within the act of parliament; for section 23. contains an express exception of the particular agents therein mentioned. Now, that exception would be wholly unnecessary, if other agents were not meant to be included within the act. The defendant in this case is convicted for having no licence at all, and therefore I think the mode of travelling wholly immaterial. It has been said that the conviction can-

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cannot be supported in its present form, inasmuch as the ground of it is, that the defendant travelled with horses. If it had been found as a fact in the case that the defendant had been convicted for want of a horse-licence, I should have thought that the conviction could not be supported; for the horses in respect of which he is bound to take out a licence are those bearing or drawing burden, or, in other words, carrying and drawing his goods. The defendant here was convicted for having no licence at all; and I think, therefore, the word "horses" may be rejected. And, besides, in the way in which the present question is brought before us, we cannot look at the form of the conviction, but merely at the case submitted to us by the sessions. The order of sessions must therefore be affirmed.

BAYLEY J. concurred.

HOLROYD J. I doubted at first whether the words of the 17th section, "trade as aforesaid," would be satisfied without an actual sale of goods. I think, however, that those words refer to the sixth section, and that they are sufficiently satisfied by a mere exposure to sale. The ground of this conviction is, that the appellant had no licence at all; and therefore the mode of travelling is immaterial, and need not be proved.

BEST J. I am of the same opinion. I think the defendant clearly within the act, from the exceptions in the 9th and 28d sections, which otherwise would have been quite unnecessary. It is said, that if we affirm this conviction, it will be impossible for an auctioneer to carry on his business; but that is not so. The
busi-

business of an auctioneer is to sell property in the town in which he resides; or to go to other persons' houses, and sell property for them at their houses. It is no part of the business of an auctioneer to travel from town to town, and sell goods there in the manner in which this defendant has acted.

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Order of Sessions confirmed.

DEAN *qui tam* against KING. (a)

DECLARATION against the defendant for penalties, under the hawkers' and pedlars' act. The first count charged that the defendant, at *Arminster*, in the county of *Devon*, being a trading person going from town to town, and travelling with a horse, and, not being a householder there, and that not being a usual place of his abode, did by himself sell by auction divers printed books, &c., contrary to the form of the statute; whereby he incurred a penalty of 50*l*. The second count charged that the defendant travelled on foot. The third and fourth counts charged him as a hawker and pedlar. There were other counts, charging offences committed at *Honiton*. At the trial before *Holroyd J.*, at the last assizes for the county of *Devon*, the following facts appeared in evidence: in *February*, 1820, the defendant had been at *Chard*, but there was no evidence that he had sold any books there by public auction; he went from *Chard* to *Arminster* in a borrowed gig, but it did not appear that any books were sent or conveyed by him from *Chard* to *Arminster*. He took two rooms at *Arminster*, and sold books by retail and by auction there: he

A person travelling from town to town, and having packages of books, &c. sent after him by public conveyance, and taking rooms at each town, and there selling such books, &c. by retail by auction, is a trading person within 50 G. 3. c. 41. s. 7.

(a) This case was heard within the first four days of term.

went

1821. went from thence to *Honiton*. It did not appear in what mode he travelled: nine chests, containing books, &c. weighing 1325lb., were sent from his rooms at *Arminster* by a common stage waggon, directed to him at *Honiton*, and there he sold books both by retail and by auction. It was proved that he was not a householder at *Honiton* or *Arminster*. Upon these facts, the learned Judge thought that he was a trading person, going from town to town, within the meaning of the 50 G. 3. c. 41.; and he directed the jury to find a verdict for the plaintiff, with liberty to the defendant to move to enter a nonsuit.

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Casberd now moved accordingly. The defendant is not a person within the contemplation of this act of parliament, which applied only to hawkers and pedlars, and persons ejusdem generis. Now a hawker is a person who carries with him, either in a package or a cart, the goods which he intends for sale. In this case the goods were sent by a common stage waggon. The term "other trading person," in the act of parliament, applies to persons of the same description as a hawker and pedlar, who deals in a small way. Here the large quantity of goods which the defendant sent from *Arminster* to *Honiton* shews that he is not a dealer of that description; and, therefore, not a person within the contemplation of the act, which meant only to apply to petty dealers carrying their commodities with them. In *Dean, qui tam, v. Hereford*, tried at the *Exeter* Spring assizes, 1820, *Wood B.* was of opinion, that a person who sent large quantities of goods by a ship to *Plymouth* dock, and conveyed them in a cart to *Plymouth* town, where he took a house, and sold them by auction, was not within this

this act. In that case it appeared that the goods, which were books, weighed two or three tons, and *Wood B.* laid particular stress on that circumstance, and said, it was more than a person going from town to town, or to other men's houses, could carry. That case is directly in point to shew, that the present defendant was not a person within the meaning of this act of parliament.

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ABBOTT C. J. I am clearly of opinion, upon the facts of this case, that the defendant was a trading person, travelling from town to town, within the meaning of this act of parliament. The argument urged on the part of the defendant, arising out of the extent of his dealings, would go to shew, that when the inconvenience to the resident tradesman is the greatest, no offence would be committed. I think that there should be no rule in this case.

Rule refused.

The KING *against* JOSEPH HANSON.

Saturday,
May 26th.

THE defendant, on the 25th day of *March*, 1820, was convicted in the penalty of 50*l.*, by two justices for the West Riding of *Yorkshire*, for having within three months last past, (to wit) on the 22d day of *February*, 1820, at *Elland*, in the West Riding, sold beer and ale by retail, to be drank and consumed in his house and premises, without first taking out an excise licence authorising him so to do, contrary to the 48 G. 3. c. 143. s. 5. Against this conviction, the defendant
appealed

No appeal lies
to the sessions
from a conviction
for selling
ale without an
excise licence
under 48 G. 3.
c. 143. s. 5.

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appealed to the next sessions held at *Pontefract*, who allowed the appeal and quashed the conviction, no evidence being offered in support of it. Upon which the proceedings were removed into this Court by certiorari. The Solicitor-general on a former day obtained a rule nisi, calling on the defendant to shew cause why the order of sessions should not be quashed, upon the ground that no appeal lay to the sessions from the conviction in this case, and that, therefore, they had no jurisdiction to quash it.

Alexander shewed cause. The question arises under the 48 *Geo. 3. c. 143. s. 13.*, which provides, that all and every the powers, directions, rules, penalties, forfeitures, clauses, matters, and things, which by the act of 12 *Car. 2. c. 24.*, or by any other law in force, relating to his Majesty's revenue of excise, are provided and established, shall be incorporated in that act. Now, by 35 *Geo. 3. c. 113. s. 12.*, which is an act in *pari materie* to the 48 *Geo. 3. c. 143.*, an appeal is given to the sessions. It would be indeed hard, if all the clauses of that act by which penalties can be enforced against the subject should be considered as re-enacted, but the clause of appeal, his only protection, omitted. In *Rex v. Justices of Surry (a)*, it was held that no appeal lay to the sessions from a conviction under 25 *Geo. 3. c. 72. s. 9.* But there was not in that case, as here, any act of parliament in *pari materie*. In *Rex v. Skone (b)*, the judgment turned on the omission of the word penalties in the appeal clause, mentioned in 12 *Car. 2. c. 24.* Here the appeal clause contained in the 35 *Geo. 3.*

(a) 2 *T. R.* 504.(b) 6 *East*, 514.

c. 113., has the word penalties. *The King v. Skone* is therefore an authority in favour of the defendant.

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*The King
against
HANSON.*

The *Solicitor-general* and *Walton* were stopped by the Court.

ABBOTT C. J. The clause of reference in the 48 Geo. 3. c. 143. only applies to such powers, &c. contained in laws relating to his majesty's revenue of excise, as are provided and established for managing, raising, levying, collecting, mitigating or recovering, adjudging or ascertaining, the duties thereby granted. Now the 35 Geo. 3. c. 113. imposed no duty, and is not an excise law. It is not, therefore, one of the laws referred to. Its object was the regulation of the police, and the provisions are quite distinct from those of 48 G. 3. c. 143. If, therefore, a person sells ale without the magistrates' licence, he sells it subject to the penalty of 20*l.* provided by that act. Against a conviction for such penalty he may appeal. But under the 48 G. 3. c. 143. he is liable to a penalty of 50*l.* for selling without an excise licence, and there is no appeal given. For the rule of law is, that although a certiorari lies, unless expressly taken away, yet an appeal does not lie, unless expressly given by statute. No act of parliament can be produced giving an appeal in the present case. The order of sessions is therefore wrong, and must be quashed.

Rule absolute.

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Saturday,
June 2d.ZOUCH *against* EMPSEY.

Notice under
32 G. 2. c. 28.
must be given
to a creditor 14
clear days, ex-
clusive both of
the day of ser-
vice and that of
presenting the
petition.

THE Lords' act, 32 G. 2. c. 28., requires that notice to the creditor should be given, fourteen days *at least*, before the petition is presented. The notice in this case was served on the plaintiff on the 19th of *May*.

Barnewall now, on the 2d *June*, moved to bring up the prisoner, and contended, that the fourteen days must be reckoned inclusive of the day of service, or of the day on which the petition is presented; and in that case the petition might be presented this day, and the prisoner brought up to be discharged on *Monday*. In *Morley v. Vaughan (a)*, this Court held, in favour of liberty, that the day of giving the notice might be reckoned as one.

The Court were of opinion, that fourteen days at least must mean fourteen clear days, and refused the rule.

Rule refused. (*b*)

(*a*) 4 *Burr.* 2525.

(*b*) Vide *Roberts v. Stacey*, 13 *East*, 20. *Rex v. Justices of Herefordshire*, 3 *B. & A.* 581.

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SOWERBY and Another *against* BROOKS, Assignee
of CARBUTT, a Bankrupt, in Error. (a) Monday,
June 4th.

THIS was a writ of error from the Court of Common Pleas. The special verdict stated, that *Carbutt* being a trader, &c. committed an act of bankruptcy on 27th *August*, 1816; that a commission issued on the 7th *October*, 1816, under which he was duly declared a bankrupt, and on 26th *November*, 1816, defendant in error was duly appointed his assignee; that plaintiffs in error were co-partners in trade, and that whilst *Carbutt* was such trader, and before his bankruptcy, they were indebted to him in the sum of 95*l.* 4*s.* for goods sold and delivered by him to them before he became bankrupt; that on the 10th *October*, being after the issuing the commission, *Carbutt*, in order to obtain payment of the same debt, sent from *Stockton*, in the county of *Durham*, where he then was, a letter directed to one *Henry Thomas*, his agent at *Manchester*, in which letter he inclosed a paper, stamped with a stamp, for a bill of exchange in blank, excepting that the name of *Carbutt* was by him written thereunder, as the maker, and was also indorsed by him thereon, as the indorser, and by that letter he requested the said *Henry Thomas* to deliver the stamp so signed to his (*Carbutt's*) father, and to tell him to date it back and place it to his own account; that the stamped paper with *Carbutt's* name thereon was accordingly on the 13th of *October* delivered to his father, *Francis Carbutt*, at *Manchester*,

The issuing a commission of bankruptcy is not of itself sufficient notice to all the world of a prior act of bankruptcy having been committed; and, therefore, if a payment be made of a debt to a bankrupt after the issuing of such commission, but before the party paying has any actual knowledge of the bankruptcy, such payment will be protected within
1 *Jac.* 1. c. 15.
s. 14.

(a) 3 *Bayly, Moore*, 157.

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and that the same was on that day filled up by some person in the form of a bill of exchange, and that it was dated back to the 4th *October*, in the same year, and that, when it was so filled up, it purported to be the bill of *Carbutt* the bankrupt directed to the plaintiffs in error, whereby he requested them, at four months after the date thereof, to pay to the order of himself 95*l.* 4*s.*, value received, and to be duly indorsed by him; that the plaintiffs in error did not see the bill of exchange, nor had they any knowledge thereof until the 30th *October*, on which day it was presented to them for acceptance in the ordinary course of business, by a third person, who was then the bonâ fide holder thereof, and was by them duly accepted, in order to discharge the said debt; *that the plaintiffs in error had not at any time before their acceptance of the bill any notice that Carbutt had become a bankrupt, or that he was insolvent, or had stopped payment, unless the issuing of the commission be by law deemed sufficient notice thereof; that the notice of the commission and bankruptcy appeared in the London Gazette for the first time on the 5th November, and that after the appearance of that notice, and after the defendant in error was appointed assignee, and before the bill of exchange became payable, namely, on the 14th January, 1817, the defendant in error, as assignee of Carbutt, demanded from the plaintiffs in error payment of the said sum of 95*l.* 4*s.*, but which they did not then nor have since paid to him; that when the bill of exchange became payable, viz. on the 7th of February, 1817, the plaintiffs in error paid the said sum of 95*l.* 4*s.*, therein specified, to a third person, who was then the bonâ fide holder thereof, and that that sum so due from the plaintiffs in error to Carbutt, at the*
time

time of his bankruptcy, was not paid by them, or satisfied in any other manner than as above mentioned.

The case was argued, on a former day in this term, by *Scarlett* for the plaintiffs in error, and by *Littledale* for the defendant in error. The authorities cited, and the arguments used, are all fully stated in the judgment of the Court, and therefore have been omitted here.

Cur. adv. vult.

ABBOTT C. J. now delivered the judgment of the Court. This was a writ of error from the Common Pleas. The action was brought by the defendant in error, as assignee of one *Carbutt* a bankrupt, for goods sold. A special verdict was found at the trial, and thereupon the Court of Common Pleas gave judgment for the plaintiff in that Court, the now defendant in error. The material facts found by the special verdict are these. The commission of bankrupt was issued under the great seal, on the 7th of *October*, 1816. On the 30th of that month, the plaintiffs in error being indebted to the bankrupt for goods sold, accepted a bill drawn upon them for the amount of the debt, the bill being presented to them for acceptance in the ordinary course of business, and they not having had at any time before their acceptance of the bill any notice that *Carbutt* had become a bankrupt, or that he was insolvent, or had stopped payment, unless the issuing of the commission be by law deemed sufficient notice thereof. The commission was first advertised in the *Gazette* on the 5th *November* following; the bill was afterwards duly paid at maturity by the plaintiffs in error. It is clear, that an acceptance of a bill, which is afterwards duly paid, is equivalent to a payment of the debt in money at the time of the acceptance, within the

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statute 1 *Jac.* 1. c. 15. s. 14. And the question in the present case is only, whether the issuing of a commission is in law to be deemed notice of a bankruptcy to a debtor who pays his debt to the bankrupt under actual ignorance of his bankruptcy. The thirteenth section of this statute, after reciting that the power given to commissioners of bankrupts, touching the debts due to the bankrupts, is not so full and perfect as that the full benefit thereof, in due course, may be employed to the use of the creditors, *as was intended*, for remedy thereof enacts, that the commissioners shall have power to grant and assign the debts due to the bankrupt, by what person, or in what manner soever, to the use of the creditors; and that, *after such assignment*, the bankrupt shall not have any power to recover, release, or discharge the same, nor shall they be attached as his debt, but the assignees shall have like remedy to recover the same, as the party himself might have had. The fourteenth section provides, "that no debtor of the bankrupt be thereby endangered for the payment of his debt, truly and bonâ fide, to any such bankrupt before such time as he shall understand or know that he is become bankrupt." The intended benefit mentioned in the statute 1 *Jac.* 1. is that which is to be found in the two former statutes, 34 & 35 *Hen.* 8. c. 4., and 13 *Eliz.* c. 7. These statutes gave power, viz. the first to the Lord Chancellor and other persons therein mentioned, and the latter to the commissioners, to take, by their discretion, orders and directions with the lands, goods, and debts of a bankrupt, and also to make sale of lands and goods; such sales to be good against all persons claiming by, from, or under the bankrupt, by any act done after he shall become bankrupt; but neither of those statutes gave a power to make sale or assignment of
of

of his debts; each of them, however, gave a further power to summon and examine persons supposed to be indebted to a bankrupt, and also inflicted upon persons refusing to be examined, or not declaring the plain and whole truth, the forfeiture of double the value of the debt concealed, and not plainly and wholly declared and shewn. On these older statutes, no case appears to have arisen on the subject of debts due to a bankrupt; and without other words than are found in those statutes, it would be difficult to say, that a debtor to a bankrupt having bonâ fide paid his debt to the bankrupt without notice of bankruptcy or commission, should be obliged to pay it over again. Such a case appears rather to be within the principle of bonâ fide transactions, protected by the seventh section of the statute of *Elizabeth*. On another branch of the statute of *Elizabeth*, the case of *Smith v. Mills, 2 Co. 25.*, arose. In that case the bankrupt had, after his bankruptcy and commission, sold goods to the value of 24*l.* to a creditor, in part satisfaction of a debt of 64*l.* The commissioners afterwards sold the same goods to the plaintiffs, and upon a question which of the two sales should be good, it was determined that the sale by the commissioners should be good, and that of the bankrupt void, and rightly so, for the creditor was within the very words of the statute: “a person claiming under the bankrupt by an act done after his bankruptcy.” And the expression which has been relied upon in the argument of this case occurs there only as an additional argument in favour of the decision. There is first a general declaration of the intent of the makers of the statute, viz. an equal and rateable distribution of the bankrupt's goods. Then follows a citation of some analogous

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cases; then an observation upon the great defect that would exist in the law, if a person, after committing an act of bankruptcy, should be allowed to make distribution of his goods to whom he pleased; and then is added, "also this case is stronger, because this gift is an assignment of the bankrupt after the commission awarded under the great seal, which commission is matter of record, whereof every one *may* take conu-
sance." And it is said immediately afterwards, that the Court relied principally on the words of the statute, "persons claiming under the bankrupt by act done after his bankruptcy;" and resolved that the "proviso" (by which I understand the seventh section of the statute of *Elizabeth* to be meant) "concerning gifts and grants bonâ fide, makes no gift or grant good which the bankrupt makes after he becomes bankrupt, but excludes them out of the penalty inflicted by the same proviso," that is, the forfeiture of double as much as he shall detain or possess. The next case quoted on the behalf of the plaintiff below was that of *Hitchcock v. Sedgwick*, 2 *Vernon*, 156. That case in effect decides no more than this, viz. that a person who took a conveyance of lands from a bankrupt on an advance of money, after a commission issued, but without notice thereof, should not be allowed in a court of equity to protect the conveyance, which was undoubtedly void at law, by obtaining in trust for himself a prior conveyance, good in law, beyond the extent of the consideration for which that good conveyance had been made. The case was decided by the Lords Commissioners of the great seal, two of whom held that this person should not have the protection of the former conveyance beyond its own consideration; and they are reported to have held also, that
this

this person was not an innocent purchaser ; saying that “when the commission was sued out, he was bound to take notice.” Now, though it should be admitted, (and I see no reason to controvert the doctrine,) that a commission actually issued will enable the assignees to redeem an original mortgage, notwithstanding the term may have come into the hands of a second mortgagee, whose title is void at law ; yet it will by no means follow, that one who has paid his debt to a bankrupt, without actual notice of a bankruptcy, shall be compelled to pay it a second time to the assignees, upon the ground of an implied notice, by the issuing of a commission which is unknown to him. The other case of *Collett v. De Gols, Ca. Temp. Talbot*, 65., decides only, that a bonâ fide purchaser, after an act of bankruptcy without notice, should not be deprived in a court of equity of his legal advantage ; and the expressions attributed to the Lord Chancellor, “The case of *Hitchcock v. Sedgwick* is different from this ; for a commission is a public act, of which all are bound to take notice,” ought in our opinion to be understood with relation only to the case before him, and to those rules of equitable jurisdiction by which his judgment was to be guided, and not to be extended to the legal construction and effect of that clause of the statute of 1 Jac. 1., upon which the question before this Court depends. The remaining case of *Watkins v. Maund*, 3 Camp. 308., turned merely upon the true meaning and effect of the phrase “issuing a commission,” in the statute 46 Geo. 3. c. 135. s. 3. And Lord *Ellenborough* at nisi prius most properly decided, that the act of delivering out a commission under the great seal was an issuing within the meaning of that statute,

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This view of the several former cases appears to leave the present question open to a decision upon the true meaning and effect of the stat. 1 *Jac.* 1. unfettered by precedent authority. It has been contended, that the fourteenth section of this statute is to be considered as a remedial law. I much doubt, and cannot assent to that proposition, because I have not been able to satisfy my mind that, before the passing of this statute, a debtor was really in any danger for such a payment as is therein mentioned. It may rather be collected from some of the expressions used in the thirteenth section, and from the very imperfect provisions regarding debts due to a bankrupt contained in the two preceding statutes, that, before the passing of this act, 1 *Jac.* 1., a bankrupt might, notwithstanding his bankruptcy, receive the money due to him from his debtor, fraud and collusion apart, which, according to the principle of the common law, will vitiate every transaction founded upon them. I therefore consider these two sections, the thirteenth and fourteenth sections of 1 *Jac.* 1., as containing one new but qualified enactment: an enactment new in itself, as giving power to the commissioners to assign the debts due to the bankrupt, and qualified by providing, that no debtor should be thereby endangered for the payment of his debt truly and bonâ fide to any bankrupt, before such time as he should understand or know that he was become a bankrupt. And we are all of opinion, that these words, “understand or know,” are to be construed according to their ordinary and popular sense, of an actual understanding or knowledge, and not of a knowledge to be implied by force of law from the secret issuing of an unknown commission, against the truth of the fact. And we find nothing in the language

guage of subsequent statutes, regarding bankruptcy, to impugn this construction. The 21 Jac. 1. c. 19. s. 14., which is properly a remedial law, protects all purchasers for good and valuable consideration, unless a commission be issued within five years after a bankruptcy. The 19 G. 2. c. 32., which is also a remedial law, protects the payment of money made by a bankrupt, *which, before the suing forth of the commission*, is really and bonâ fide, and in the usual and ordinary course of trade and dealing, received of a bankrupt, before such time as the person receiving the same shall know, understand, or have notice that the party is become a bankrupt, or is in insolvent circumstances. It is obvious that the issuing of a commission is not, under either of those statutes, made equivalent to notice. It is in truth made only the limit of the period to which the relief thereby given should be confined. And it is to be observed, that the latter of these two statutes regards only payments made by the bankrupt, and there is a great difference between losing the benefit of a receipt of money and being subjected to make a payment twice over: the first payment by the debtor to the bankrupt must, unless there be great misconduct on the part of the bankrupt, enure, by an increase pro tanto of the distributable fund, to the benefit of those very creditors who claim the second payment of the same debt: whereas a receipt from a bankrupt operates pro tanto in diminution of the distributable fund, and, so far as it extends, defeats the general object of the law, an equal division among all the creditors. The first statute, wherein the issuing of a commission is in express terms made equivalent to notice of bankruptcy, or insolvency, is the 46 G. 3. c. 135. This is also a remedial law; and
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the remedy operates much more extensively than under any former statute; for it extends, in cases of future commissions, to all conveyances by, all payments by and to, and all contracts and other dealings and transactions by and with any bankrupt *bonâ fide* made and entered into more than two calendar months before the date of the commission, meaning the commission under which they might otherwise be impeached. And the legislature thought fit to limit this extensive remedy, not only to the absence of actual notice of bankruptcy or insolvency, but also, by express words, to the absence of any prior commission, or docket struck, although nothing may have been done thereupon, or the commission be superseded; and this is effected in form by providing, that those acts should be deemed notice of a prior act of bankruptcy within the meaning of that statute, if an act of bankruptcy had been actually committed. Large as the remedy provided by this statute, 46 G. 3., appears to be, it was thought not to include the case of an execution or attachment against the lands or goods of a bankrupt; and, therefore, the remedy was extended to those cases by the 49 G. 3. c. 121. s. 2., with a similar proviso as to a commission issued, although afterwards superseded. We are aware of the expression in each of these two statutes, "a commission issued, although the same may have been superseded." By the first of the two statutes, in which such a provision occurs, the striking a docket was made equivalent to notice: this is a less formal and effective act than the issuing of a commission, and is an act upon which, I believe, it often happens that no commission is taken out. And if the legislature, in providing a new and very extensive remedy, thought fit to make the striking of

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of a docket notice, it would, à fortiori, make the issuing of a commission notice, although it should be superseded. And this provision might be retained in a statute made to extend the class of cases to which the first applied, although the effect of striking a docket was at the same time repealed. And we cannot infer from these statutes that the legislature considered the issuing of a commission to be by operation of law, and against the truth of the fact, an understanding or knowledge of a bankruptcy within the meaning of the fourteenth section of the statute 1 Jac. 1. We think, also, that too much effect has been given in the course of this cause to those dicta in the older cases, which were uttered with reference to a different statute, and on a different occasion. Our present opinion derives confirmation from the subsequent statute of the 56 G. 3. c. 137., which does not appear to have been adverted to in the Court of Common Pleas. This last statute was passed for the express purpose of extending the provision of the statute 1 Jac. 1., and it does in effect extend the provision therein contained, in regard to payment of debts to a bankrupt, to the delivery of his goods or effects to him, and this in terms precisely similar to those of the statute 1 Jac. 1., by enacting, that no person *shall be endangered* by reason of the delivery of goods or effects, truly and bonâ fide, to a person who shall be bankrupt, before such time as the person having the goods, &c. shall understand or know that the person to whom they belong is become bankrupt. Now this statute was passed after the two before mentioned, wherein the issuing of a commission is made notice of a bankruptcy, and not long after. It is manifest that the legislature did not, in this case, intend that a superseded commission should be

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be deemed notice; for if that intention had been entertained, it can hardly be doubted that it would have been expressed in the same terms as in the two statutes so recently passed. If such a clause had been introduced, it seems the statute would have been entirely useless, because the case provided for by it is a case within the meaning and operation of the statute 46 G. 3. It appears, therefore, to have been framed to extend a particular provision of the statute 1 *Jac.* 1. to another and analogous case, and this unfettered with that special enactment as to notice by operation of law, which is found in the 46 G. 3. These observations do not conclusively prove, with the certainty of mathematical demonstration, that the legislature might not think a commission notice to all the world, if it should be acted upon as well as issued, and not afterwards superseded; but we think they furnish a moral inference that no such opinion was entertained; because, if such an opinion had been entertained, we think some expression or intimation of that opinion must have occurred. Finding nothing of this sort, as applied to the case of the payment of money due to a bankrupt, or the delivery of his own goods to him, and adverting to the obvious distinction, before alluded to, between those two cases and the cases of title derived or money received from a bankrupt, we think that in the case before us the issuing of the commission was not notice in point of law, and we are all of opinion that the judgment of the Court of Common Pleas must be reversed.

Judgment reversed.

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JOHNSON *against* WALKER.Monday,
June 4th.

THESIGER, on a former day in this term, had obtained a rule nisi for setting aside the writ of procedendo issued in this cause. It appeared, from the affidavits, that the cause was commenced in *Hilary* vacation in the Palace Court, and that it was removed by habeas corpus, and a rule for better bail served, on the 9th of *April* last. Notice of justification was given for the first day of *Easter* term; the bail did not justify on that day; but on the second day of *Easter* term the defendant was rendered, and notice of render served upon the plaintiff's attorney; after which, upon the same day, the writ of procedendo was issued.

Plaintiff in an inferior court, from which a cause is removed by habeas corpus, and a rule for better bail given, is not entitled to a procedendo, after render of defendant and notice of such render, although the render be made after the day on which the rule for better bail expires.

Lawes now shewed cause, and distinguished this case from *Farquharson v. Fouhecour* (a), upon the ground that there the render had been made on a day previous to that on which the procedendo issued; and he referred to *Davis v. Tuddenham* (b), where the procedendo having issued on the same day on which the bail justified was held to be quite regular. He referred also to *Rex v. The Sheriffs of London* (c), where an attachment was issued after a notice of render, the render having been out of time; and it was held that the attachment was regular.

ABBOTT C. J. In the report of *Davis v. Tuddenham*, it does not appear whether or not there was any notice

(a) 16 *East*, 387.(b) 1 *Chitty*, 130.(c) 1 *Chitty*, 567.

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of the bail having justified served upon the plaintiff's attorney, which makes all the difference. There the time for justifying the bail expired on the 18th, and the procedendo issued on the 19th; and if that was issued before notice of the justification was served, it would be regular. But here, the procedendo issued after notice of the render, and that brings it within the case of *Farquharson v. Fouchecour*, which must govern our decision. Besides, what necessity can there be for going down again to the inferior Court, when the defendant being rendered the plaintiff has him in Court, and may proceed against him here. This rule, must, therefore, be made absolute.

Rule absolute. (a)

(a) On examining the affidavits in *Davis v. Tuddenham*, we find that they do not state that any notice of bail having justified was given previously to the issuing the writ of procedendo in that case.

Monday,
 June 4th.

REYNOLDS *against* HANKIN.

An arrest of a party, described in a testatum special capias and in the affidavit to hold to bail by the initials of his Christian name only, is irregular.

D. *F. JONES* had obtained a rule, calling upon the plaintiff to shew cause why the bail-bond, given in this case, should not be delivered up to be cancelled, and the defendant discharged upon entering a common appearance, he having been arrested on a testatum special capias by the name and description of *F. W. Hankin*, and the affidavit to hold to bail having described him in a similar manner, without setting out his Christian name at length. The affidavits on the other side stated, that the defendant was indebted to the plaintiff,

be

by virtue of an acceptance of a bill of exchange, signed by the defendant with the initials of his Christian name, and that the plaintiff had endeavoured, without effect, to ascertain his Christian name previously to the arrest.

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Chitty showed cause, and referred to *Howell v. Coleman* (a) as expressly in point.

Jones, contra, mentioned two cases, of *Turner v. Colville*, and *Morland v. Same*, in this Court, in *Michaelmas* term last, in which the Court had, under similar circumstances to the present, made the rules absolute.

Cur. adv. Vult.

And now, on this day, *Abbott C. J.* stated, that the Court had looked at the affidavits in the cases to which they had been referred, and that, upon the whole, they were of opinion, that it was not sufficient to describe a person by the initials of his Christian name only, and that, therefore, the rule must be made absolute.

Rule absolute.

(a) 2 Bos. & P. 466.

WILSON against FARR.

Monday,
 June 4th.

HUTCHINSON had obtained a rule to shew cause why the writs of scire facias issued against the bail in this cause should not be set aside. It appeared that a scire facias was issued, and left for a return of nihil, and lodged at the office of the sheriff of *Middlesex* on the 30th *January*, being returnable on the 3d

An alias scire facias issued against bail must be left at the sheriff's office four days, exclusive both of the day of lodging it and the day of the return.

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February, and that an alias scire facias was issued and left at the office for a like return on *Tuesday, February 6th*, returnable on *Saturday, February 10th*.

Long shewed cause, and referred to the rule 5 *Geo. 2. 1732, Easter term*, and contended, that it was not necessary that the four days, during which an alias scire facias was to lie in the office, should be exclusive both of the day of lodging it and of the day of the return.

Hutkinson, contra, referred to *Anonymous (a)*, and *Howard v. Smith (b)*, where it was held, that a ca. sa. against the principal, in order to charge the bail, must lie four days exclusive at the sheriff's office; and he contended that a similar rule was applicable to the present case.

Per Curiam. There is a difference of expression in the rule 5 *Geo. 2.* In the first part of it, it states, that every writ of scire facias, of which notice shall be given to the defendant, shall be left in the office four days before the return exclusive of the day of return; but in the latter part of the rule, which is applicable to the present case, the phrase is different: it is there stated, that every writ of alias scire facias shall be left in the office four days exclusive before the return. We are, therefore, of opinion, that the four days must be exclusive of the day on which the writ is lodged, and of the return day also. The present rule must, therefore, be made absolute.

Rule absolute.

(a) 2 *Salk.* 599.

(b) 1 *B. & A.* 529.

RULES OF COURT.

IT IS ORDERED, That in all country ejectments, which hereafter shall be served before the essoign-day of any *Michaelmas* or *Easter* term, the time for the appearance of the tenant in possession shall be within four days after the end of such *Michaelmas* or *Easter* term, and shall not be postponed till the fourth day after the end of *Hilary* or *Trinity* terms respectively following.

By the Court.

IT IS ORDERED, That in future, where a rule to shew cause is obtained in this Court to set aside an award, the several objections thereto, intended to be insisted upon at the time of making such rule absolute, shall be stated in the rule to shew cause.

By the Court.

END OF EASTER TERM.



C A S E S

ARGUED AND DETERMINED

1821.

IN THE

Court of KING's BENCH,

IN

Trinity Term,

In the Second Year of the Reign of GEORGE IV.

BRUNTON *against* HAWKES and Others (a).

DECLARATION stated that plaintiff was the first and true inventor of certain improvements in the construction of, making, or manufacturing of ships' anchors and windlasses, and chain-cables or moorings; and which said invention, others before the making of the patent did not use, and thereupon, on 26th *March*, 1813, by letters patent, reciting that plaintiff had by his petition, humbly represented to our Lord the King, that he, plaintiff, had found out and discovered certain improvements in the construction of, making, or manufacturing of ships' anchors and windlasses, and chain-cables or moorings, which he conceived would be of

A patent for improvements in the construction of ships' anchors, windlasses, and chain-cables, cannot be supported unless there is novelty in each invention; and therefore, where it turned out that there was no novelty in the construction of the anchors, it was held that the patent was wholly void.

(a) This and the two following cases were argued at the sittings before *Easter term*.

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public utility; that he was the first and true inventor thereof; and that the same had not been theretofore made, used, or practised by any other person to the best of his knowledge, our Lord the King granted unto plaintiff his special licence, full power, sole privilege, and authority, that plaintiff, his executors, &c. from time to time, during fourteen years, should and lawfully might make and exercise and vend *his said invention*, &c. The patent was then set out in the usual form. The declaration then stated the enrolment of the specification within the time prescribed, and the infringement of the patent, by the defendant selling chain-cables of the improved construction invented by plaintiff: Plea not guilty. The cause was tried before *Abbott* C. J. at the *Middlesex* sitting, after *Easter* term, 1820. The specification stated the plaintiff's improvements in manufacturing ships' anchors to be, that in place of the common method of joining the arms to the shank, which was by welding, and which required the iron to be so frequently heated as to destroy and injure its tenacity, he made the shank in one piece, and the two arms in another piece. The piece intended for the arms is formed into shape, and of such a thickness or substance in the middle, as to allow a hole to be made through the centre of the solid piece, to receive the thick end of the piece which forms the shank, and the said hole in the arm-piece is made somewhat conical or bell-mouthed, so that no strain can separate the arms from the shank; by which means the necessity of endangering the solidity of the materials is avoided, only one heat being necessary to bring the thick end of the shank and the hole in the arm-piece into perfect contact; for the strength of this important part of the anchor is not trusted to a union

union effected by welding, which may be, and generally is, defective; but to the impossibility of drawing a thick solid conical piece of iron through the smaller aperture of a conical opening into which it is fitted. The arms with their flukes may be made of good cast iron, taking care to allow them sufficient substance. But anchors should not only have the utmost strength which can be attained, but also be made as secure as possible against the danger of being lost, by the cable or chain by which they are attached to the ship giving way. Cables made of hemp can never be rendered safe, but chain-cables may. The specification then described the improvements in the construction of chain-cables and moorings, and stated, that the object to be gained was the greatest possible strength from a given quantity of materials, keeping in mind the direction in which the strain is to be borne. It then shewed, that the applying receding forces to a circular link, would change its form into one with round ends and parallel sides, and that the effect of this alteration was to destroy the link, by disturbing the relative position of every particle of the metal and destroying its corpuscular attraction, and concluded that a circular was therefore a bad form. The specification then stated, that if the sides of the circular link were prevented from collapsing, the evil would be thereby lessened; and that, if a stay or diagonal bar were introduced between the sides of the circular link, it would then be able to resist a greater force than before, having two points of support; the unsupported parts, however, would, by applying a strain, assume a quadrilateral form, a change which could not be effected without a derangement of the matter in the link, which must rupture and destroy it. It stated, that stays with

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pointed ends had been used in chains, but that such a stay only supported two opposite points of the link; the tendency of the receding forces being to straighten and consequently to rupture the parts that were left unsupported. It then proceeded thus: "My said improvements in chain-cables or moorings are founded on considerations drawn from the facts that have been alluded to. If a circular link, instead of being supported only in two opposite points, have its opposite sides supported by a stay embracing two considerable and opposite segments, taking care to leave such opening as shall allow sufficient play for the links received into it, the link would be much stronger than with a stay having its ends pointed; but still the link would be of a bad form; and, moreover, even if circular links could be made unobjectionable as to strength, they should be avoided on account of the greater weight of metal which a given length of chain would require, than when formed of links of a less exceptionable form. We have seen that the tendency of receding forces applied to curved links, is to draw portions of them into straight forms; thence, it follows, that twisted links of every kind should be avoided where strength is required; for such links, even if their opposite sides be supported by an interposed stay, must by the application of a sufficient strain untwist themselves to become straight, and thus have the arrangement of their particles disturbed. As the tendency of forces, applied as before-mentioned, to curved or twisted links, is to convert the curves or distortions into straight portions as above described, it follows, that links presenting in their original construction straight parts between the points of strain are the strongest that can be made, with an equal portion of metal; and hence links with
parallel

parallel sides and semi-circular ends, would in every case be preferred, were it not necessary to the quality of good chain, that it should be able to resist lateral violence, as well as a general strain operating by stretching." After shewing the effect of a lateral strain upon such a link the specification then proceeded thus: "From the preceding considerations it is evident, that of all the forms and constructions that can be given to a link, that form and construction which shall be able to convert a lateral into an end strain, by yielding proper support to the opposite sides of the link, is the one that should be preferred; and of such a form and construction is the link described in a figure annexed to the specification having circular ends and sides nearly parallel but bulging out towards the middle, with my broad-ended stay introduced between the sides of the link. At the time the stay is introduced, the link is wide enough to receive it; and the link being red hot at the time of its introduction, and being pressed home to the stay, by a die or press, or any suitable mechanical means, takes a fast hold of it and retains it in its place. Other ways of introducing and retaining in its place this broad-ended stay may be employed; but the preceding one has been found exceedingly simple and efficacious. These broad-ended stays should embrace the whole or the opposite curved parts of the middle of the link."

It was proved at the trial, that before the granting of the patent, mooring-chains had been used, the links of which were twisted, and the stay was introduced into holes made in the sides of the link; the twisting of the link, as well as the perforations of it to admit the stay, had the effect of weakening it. The sides of the plaintiff's link were in the same plane, and his stay was introduced in the manner described

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in the specification, without perforating or otherwise weakening the sides. It was also proved by a series of experiments, made by scientific men, that the plaintiff's mooring-chains were capable of resisting a much greater force than those in use before. It was admitted at the trial, that the mode of manufacturing anchors described in the specification, had never been applied before to ships' anchors. But it had been applied before to the adze-anchor, and the mushroom-anchor. These anchors are used only for the purpose of mooring floating lights or vessels intended to remain stationary; and are never taken on board. No point was made as to the windlasses, which were admitted to be new. *Abbott C. J.* left it to the jury to say, whether the invention both as to the chain and the anchor, were new and useful, and the jury found a verdict in the affirmative for the plaintiff. A rule nisi was obtained for a new trial, on the ground, first, that there was not sufficient novelty in either of these inventions, to make them the proper subject of a patent. Secondly, that at all events, there was no novelty in this mode of manufacturing anchors; and the patent being granted for three several things, if void as to one, was void as to the whole.

Scarlett, Marryat, Gurney, and Chitty, now shewed cause against the rule. There is sufficient novelty in either of the inventions described in the specification, to sustain a patent. The invention, as to the mooring-chain, comprises the combination of the particular form of link with the particular form of stay. Links had existed before in every shape, and stays had been applied before for a variety of purposes. The merit of the plaintiff's invention consists in this, that he has so combined his link and stay together, as to give it

it the greatest possible strength. That is effected, by placing the stay in such a position, as to make the link continue in its original shape, when it is subject to the greatest strain. The link and stay are so united together, as that the former will never alter its form without a rupture, and that has never been accomplished before. The invention, therefore, does not consist in the form of the link or the form of the stay, although if either is altered, the invention would be destroyed. If the stay were pointed, it would operate unfavourably on that part of the link against which it rested, and, therefore, it is necessary to have a broad ended stay to prevent the chain collapsing. If the link be twisted, it would not have its full play; if it were circular, it would be changed by a strain, into an oval form. Secondly, the invention as to the anchor is new. The mode pointed out in the specification has never before been applied to the manufacturing of ships' anchors. It is true, that it has been applied to that, which, from the poverty of language, is embraced under the same generic word, viz. a mushroom-anchor. That, however, is never taken on board a ship, but is deposited; a quantity of sand is thrown on it, and it then becomes fixed to the spot, and, though called an anchor, it is, in fact, a sub-marine post. It is used for the purpose of floating lights, and cannot be raised. The object of a ship's anchor, on the other hand, is to bring the ship to a fixed position; it is to be afterwards raised and carried with the ship. If the former had been called an iron sub-marine mooring-post, it could not have been an objection to the plaintiff's patent, that he had first applied this mode of uniting the parts used in that mooring-post to ships' anchors. The merit of the plaintiff's invention consists in the application of a

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known principle to a new subject matter. It is true, that this mode of uniting the flukes to the shank has long been in use, in the case of the common hammer and the pick-axe; but they are instruments applied to very different purposes. The merit of this patent consists in the first application of that mode of uniting the several parts to ships' anchors. An adze-anchor, also, is formed in the same manner, but that, also, is no more than a mooring-post. The plaintiff has first applied to a ship's anchor a mode of construction never used before, and the jury have found it to be both new and useful. Assuming, however, that this mode of manufacturing anchors was not new, the patent is then only void *pro tanto*. The patent is for improvements in three things, distinct in their nature; for each of these the plaintiff might have obtained a separate patent. If, indeed, it were taken out for the combined use of three things, in a case where the invention would not be perfect unless all three were brought into action, the patent would necessarily be void, unless the whole were new. The crown, by its prerogative, might grant three different estates in three different counties, by one patent. If, from some circumstance, the grant was void as to one estate, it by no means follows that it would be void as to the other two; so, if an individual was to convey three estates by one deed, and the consideration for the conveyance of two was clear and distinct, but there was fraud as to the other, so as to make the grant as to that void, the deed would not be void as to the whole. In *Hill v. Thompson* (a), the patent was for an invention of certain improvements in the smelting and working of iron, or, in other words, in the manufacture

(a) 2 Bayly Moore, 424.

of iron. The improvements there contemplated, applied entirely to one subject matter. The inventor there, assumed to himself to produce different results from the same process. He was, in the course of that process, to extract the iron, and also to remedy a certain disease to which that iron was liable. That was done in the course of carrying it through the same furnaces; that was one entire operation, described in the patent as producing certain distinct results, and it was applied to the same subject matter. Besides, that case was decided upon another ground, viz. upon the want of proof of the imitation of the invention. In this case, the new inventions are applicable to different and distinct objects, viz. the cable, the windlass, and the anchor, each of which may be separately used. The plaintiff, in effect, has only comprised in one patent the subject of three distinct inventions. Suppose a man had invented an original form of a chair for a gouty man, and also an anchor, and he had taken out one patent for the two, and it turned out, in the event, that the anchor was not new, the patent would not, therefore, be wholly void.

ABBOTT C. J. It is not without great reluctance that my mind has at length come to a conclusion, which (as far as my judgment goes) will have the effect of avoiding this patent. It appeared in evidence, at the trial, that the mode of making cables and anchors, introduced by the plaintiff into general use, was highly beneficial to his majesty's subjects; and I should wish that he who introduced it might be entitled to sustain the patent. Upon a full consideration of all the arguments that have been addressed to us, and a view of the patent, the specification, and the evidence given at the trial, I feel myself compelled to say, that I think so much of the plain-

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plaintiff's invention as respects the anchor is not new; and that the whole patent is, therefore, void. The mode of joining the shank to the flukes of the anchor is to put the end of the shank, which is in the form of a solid cylinder, through the hollow and conical aperture and it is then made to fill up the hollow, and to unite itself with it. Now that is precisely the mode by which the shank of the mushroom-anchor is united to the mushroom top; by which the shank of the adze-anchor is united to its other parts. It is indeed the mode by which the different parts of the common hammer, and the pick-axe also, are united together. Now, a patent for a machine, each part of which was in use before, but in which the combination of the different parts is new, and a new result produced, is good; because there is a novelty in the combination. But here the case is perfectly different; formerly three pieces were united together; the plaintiff only unites two; and, if the union of those two had been effected in a mode unknown before, as applied in any degree to similar purposes, I should have thought it a good ground for a patent; but, unfortunately, the mode was well known, and long practised. I think that a man cannot be entitled to a patent for uniting two things instead of three, where that union is effected in a mode well known and long practised for a similar purpose. It seems to me, therefore, that there is no novelty in that part of the patent as affects the anchor; and, if the patent had been taken out for that alone, I should have had no hesitation in declaring that it was bad. Then, if there be no novelty in that part of the patent, can the plaintiff sustain his patent for the other part, as to the mooring-chain? As at present advised,
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I am inclined to think that the combination of a link of this particular form with the stay of the form which he uses, although the form of the link might have been known before, is so far new and beneficial as to sustain a patent for that part of the invention, if the patent had been taken out for that alone. But inasmuch as one of the things is not new, the question arises, whether any part can be sustained. It is quite clear that a patent granted by the crown cannot extend beyond the consideration of the patent. The king could not, in consideration of a new invention in one article, grant a patent for that article and another. The question then is, whether, if a party applies for a patent, reciting that he has discovered improvements in three things, and obtains a patent for these three things, and in the result it turns out that there is no novelty in one of them, he can sustain his patent. It appears to me, that the case of *Hill v. Thompson*, which underwent great consideration in the Common Pleas, is decisive upon that question. In that case, the patent was granted to the plaintiff for the invention of certain improvements in the smelting and working of iron; and the Court of Common Pleas appear to have considered that the improvement introduced by the plaintiff into what may properly be called the smelting of iron, was the obtaining iron from that cinder and slag which before had been thrown away as refuse, and that that might be considered as new. It appeared, however, that the plaintiff claimed further the merit of having discovered that the application of lime in certain stages of the process would cure a disease common to all iron, not merely to that which he was to produce, but to iron originally manufactured from the fresh ore. Now it
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turned out that that was not a discovery; for the application of lime to iron made from the cinder, originally used in making ore, was known and practised before. No two things can be more distinct in their nature than the obtaining of iron from a material from which it was impracticable to obtain it before, and the cure or prevention of a disease to which all iron was subjected. In that case, however, the Court of Common Pleas held, that, admitting there was novelty in the one, yet, as there was no novelty in the other, the patent was wholly void. The only difference between that case and this is, that here the plaintiff, instead of saying that he has made certain improvements, states the improvements; but still he claims the merit of having invented improvements in all the three. The patent is granted upon the recital that he has made improvements in all the three, and that they are new; and the consideration of the patent is the improvement in the three articles, and not in one; for an improvement in only one of them would render the patent bad. The consideration is the entirety of the improvement of the three; and if it turns out there is no novelty in one of the improvements, the consideration fails in the whole, and the patentee is not entitled to the benefit of that other part of his invention. For these reasons, I am of opinion that this patent cannot be supported. There must, therefore, be a new trial. The plaintiff, if so advised, may then put the question upon the record, and take the opinion of a court of error.

BAYLEY J. I think that in this case, there ought to be a new trial. I have no doubt that if the patent be bad as to part, it is bad as to the whole. If a patent is
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taken out for many different things, the entire discovery of all those things is the consideration upon which the king is induced to make the grant. That consideration is entire, and if it fails in any part it fails in toto. Upon an application for a patent, although the thing may be new in every particular it is in the judgment of the crown, whether it will or will not, as matter of favour, make the grant to the person who has made the discovery. And when an application is made for a patent, for three different things, it may be considered by the persons who are to advise the crown as to the propriety of the grant, that the discovery as to the three things together may form the proper subject of a patent although each per se, would not induce them to recommend the grant. It seems to me, therefore, that if any part of the consideration fails, the patent is void in toto. Now, in this case, the patent is for the improvement of ships' anchors, and windlasses, and chain-cables, or moorings. If it had stood on the subject of the improvement in chain cables only, the impression on my mind is, that the patent would have been good. The improvement in that respect, as it seems to me, is shortly this: so to apply the link to the force to operate on it, that that force shall operate in one place, namely, at the end; and this is produced by having a bar across, which has not the defect of the bar formerly used for similar purposes. The former bars weakened the link, and they were weak themselves, and liable to break, and then if they broke, there might be a pressure in some other part. Now, from having a broad-ended bar, instead of a conical one, and having it to lap round the link, instead of perforating it, that inconvenience would be avoided; and therefore the present impression on my mind

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mind as to this part of the case is, that the patent might be supported. As to the ship's anchor, in substance the patent is, for making in one entire piece, that which formerly was made in two. The two flukes of the anchor used to consist of distinct pieces of iron, fastened to the shank by welding. In the present form, the flukes are in one piece, and instead of welding them to the shank, a hole is made in the centre, and the shank introduced through the hole. Could there be a patent for making, in one entire piece, what before had been made in two pieces? I think not; but if it could, I think that still this would not be new. In the mushroom and the adze-anchors, the shank is introduced into the anchor by a hole in the centre of the solid piece; and in reality, the adze-anchor is an anchor with one fluke, and the double fluke-anchor is an anchor with two flukes. After having had a one-fluked anchor, could you have a patent for a double-fluked anchor? I doubt it very much. After the analogies alluded to in argument, of the hammer and pick-axe, I do not think that the mere introducing the shank of the anchor, which I may call the handle, in so similar a mode, is an invention for which a patent can be sustained. It is said in this case, that the mushroom-anchor, and adze-anchor, are not ships' anchors, but mooring-anchors. I think they are ships' anchors; they are not indeed such anchors as ships carry with them, for the purpose of bringing the ship up; but if the ship is required to be stationary, at a particular place, then the common mode of making it stationary, is by the mushroom-anchor. So the mode adopted to bring a ship containing a floating-light to an anchor, is by mooring her to one of these mushroom-anchors. That is the description of anchor

chor for a holdfast to the ship. The analogy between the case of the mushroom-anchor, and of the adze-anchor, is so close to that of the present anchor, that it does not appear to me that this discovery can be considered so far new as to be the proper ground of a patent. In reality, it is nothing more than making in one piece, what before was made in two, and introducing into this kind of anchor, the shank in the way a handle is introduced into a hammer or pick-axe. I think, therefore, that this not being a new discovery, the patent is wholly void, and that being so, there must be a new trial. The plaintiff may then put the question upon the record, and take the opinion of a court of error on the subject.

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BEST J. I am of the same opinion. In the case of *Hill v. Thompson*, the Court of Common Pleas, with great reluctance, came to the conclusion, that a patent taken out too large, is not only void for the excess, but void altogether. That case afterwards came under the consideration of the Lord Chancellor; and he is reported to have said, "In his directions to the jury, the Judge has stated it as the law on the subject of patents, first, that the invention must be novel; secondly, that it must be useful; and, thirdly, that the specification must be intelligible. I will go further and say, that not only must the invention be novel and useful, and the specification intelligible, but also that the specification must not attempt to cover more than that, which being both matter of actual discovery and of useful discovery, is the only proper subject for the protection of a patent, and I am compelled to add, that if a patentee seeks, by his specification, any more than he is strictly entitled to, his patent is thereby rendered ineffectual, even to the extent

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extent to which he would be otherwise fairly entitled. On the other hand, there may be a valid patent for a new combination of materials previously in use, for the same purpose, or for a new method of applying such materials; but in order to its being effectual, the specification must clearly express that it is in respect of *such new combination or application*, and of that only, and not lay claim to the merit of original invention in the use of the materials." (a) The case, indeed, does not want that authority; for in the patent the king states, that he grants it upon condition that the specification shall be enrolled in the Court of Chancery for the inspection of the public. According to these terms, therefore, the specification must embrace two objects; it must first clearly describe the nature of the invention; and, secondly, the manner in which it is to be performed. When this case was first presented to my mind, it occurred to me, that this was a new combination of old principles, and that the patent was therefore good. I now, however, doubt whether the patent could be supported as to the mooring-chain, for the specification cannot stand as a description of a new combination of known principles: it claims an invention as to a part of it, which certainly is not new. I allude, particularly, to the form of the link. The specification states, that the object to be gained, is the greatest possible strength from a given quantity of materials, keeping in mind the direction in which the strain is to be borne. It afterwards says, that this is to be done by the use of that which is new, viz. by the stay introduced between the links, and which, instead of entering them, embraces their sides. If that alone was to be done, it would be new;

(a) 3 *Merivale*, 629.

but

but the specification further goes on to say, "It is evident, that of all the forms and constructions that can be given to a link, that form and construction which shall be able to convert a lateral into an end strain, by yielding support to the opposite sides of the link, is the one that should be preferred." It appears to me, that the patentee here first claims the merit of originally using the links in the particular form described in his specification, instead of circular links. Now there can be no doubt that links of that form had been used long before. Then as to the anchor, the invention claimed is, that he avoids the welding; but that certainly is not new, because that has been done before, in the case of the mushroom and adze anchor, the pickaxe, and the common hammer. It is said, however, that his invention consists in the application of that which was known before to a new subject matter, viz., that he had, for the first time, applied to the manufacturing of anchors, a mode in which welding was avoided, which, however, had been long practised, in other instances to which I have before alluded; but he does not state that as the ground upon which he had applied for his patent, nor state in the specification, that it being known that the process of welding weakens the anchor, he had first applied to an anchor a mode long practised in the manufacture of other instruments, viz. of making the two flukes of one piece instead of two. If he had so described his process, the question would then arise, whether that would be a good ground for a patent. I incline to think, however, that it having been long known that welding may be avoided in instruments of a similar form, the application of that practice, for the first time, to a ship's anchor cannot be considered

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a new invention, and, therefore, that it is not the ground of a patent. It is unnecessary, however, to decide that question in this case, because the patentee has claimed the mode of avoiding welding as a new discovery. That is not a new discovery, and he has therefore taken out his patent for more than he is entitled to; and I am of opinion, that that avoids the patent in toto. For the king is deceived; the patentee is represented to have the merit of inventing two things, whereas he has discovered only one; and the crown might have considered the discovery, as to both, a sufficient ground for granting a patent, when it would not have thought so of the discovery of one alone. This has been compared, in argument, to the case of a grant of lands. If in the same deed, there were included three conveyances of three distinct estates on three considerations, one might be set aside and another be good; but if the grant were upon one consideration which was bad, the whole would be void, because the consideration would fail altogether. Now the present case is similar to that, because here, the consideration to induce the king to grant the patent, was the statement made by the plaintiff in his petition, that there had been three inventions, when, in fact, there had been only two. The united consideration upon which the whole grant was made, is therefore void; and, consequently, the grant itself is void. I am therefore of opinion, that there ought to be a new trial.

Rule absolute. (a)

The *Solicitor-General*, Gaselee, Stephen, and F. Pollock, were to have argued in support of the rule.

(a) See *Arthur Leggatt's case*, 10 Co. Rep. 109.

1821.

WELLS *against* MILES and Another.

TRESPASS for taking and carrying away plaintiff's wheat. Plea, that the Marquis of *Buckingham* was seised of the manor of *Aylesbury* with *Bierton*, in the county of *Buckingham*, in fee, and that he, and all those whose estate he had in the manor from time immemorial, had been used to hold, at the town of *Aylesbury*, on every Saturday throughout the year, a market for the buying and selling of corn, grain, &c. usually sold at markets, as to the said manor belonging, and that the said Marquis, and all those, whose estate, &c. from time immemorial, had taken a certain reasonable toll of all common grain, &c. brought to the said town of *Aylesbury*, to be sold on any market day there, whereof any part was pitched within the said market for sale, and which said common grain, &c. should be there sold on the market day, subject to certain exceptions therein set forth. It then stated, that the Marquis, on &c. demised by indenture unto the defendant, the tolls payable at the market for one year, by virtue of *which said indenture* the defendant entered upon, and took the said toll so demised, and was lawfully possessed thereof. It further alledged, that on, &c. the plaintiff brought into *the said town* of *Aylesbury*, for the purpose of being sold *there*, a quantity of wheat, and did then and there pitch a part thereof, that is to say, one sack thereof respectively within the said market for sale, the residue of the wheat being deposited within the town of *Aylesbury*, and which quantity of wheat was then sold upon the market-day, at the market. By reason whereof,

A prescription for toll of corn brought into a town to be sold on a market-day there, whereof any part is pitched within the market for sale, and which shall be there sold, is bad, inasmuch as there cannot be any toll in respect of goods not actually brought into the market.

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the defendant was entitled to take from the said wheat, the tolls so due and payable, and so justified the taking of the wheat in question, as the toll. Replication denied the prescription stated in the plea, upon which issue was joined. The cause was tried before *Holroyd J.* at the *Buckingham* Summer assizes, 1820, and the jury found a verdict for the defendant. A rule nisi for entering judgment for the plaintiff, non obstante veredicto, having been obtained by *Blosset Serjt.* in last *Michaelmas* term,

Tindal now shewed cause against the rule. The jury having found that the prescription stated in the plea was proved in fact, the burthen of shewing it to be bad in point of law, lies on the plaintiff. In the *Terms de la Ley*, toll, or tolne, is defined to be a "payment used in *cities, towns, markets, and fairs*, for goods and cattle brought thither to be bought and sold; and is always to be paid by the buyer, and not by the seller, except there be some custom otherwise." And Lord *Coke*, in 2 *Inst.* 220., defines it to be "a reasonable sum of money due to the owner of the fair or market, upon sale of things tollable within the fair or market, or for stallage, picage, or the like." The place, the time, the sale of the goods, and the payment by the buyer, are therefore the essential characteristics of toll, and the toll claimed in this plea answers the definition in all these points. First as to place; the place is substantially *the town* in which the market or fair is held, for where no precise limits are fixed, the market and town are co-extensive. Lord *Coke* in 2 *Inst.* 220., after citing from the *Mirror*, "*negotiator in vulgo si quid mercatus fuerit in eam rem testimonia habeto; nemo*

extra

extra oppidum, nisi præsente præposito aliisve fide dignis hominibus, quicquam emito ;” and from another part of the same, “ Ne quis *extra oppidum* quid emat ;” says, “ in these laws, *oppidum* is taken for *fair* or *market*.” In *Curwen v. Salkeld* (a), it was expressly held that the lord of a manor, to whom the grant of a market was made *infra villam* de *W.* &c., whether villa extend to the town of *W.* or to the township or parish of *W.* “ has a right to remove the market place from one situation to another within the precinct of his grant.” Besides these express authorities, it is evident from analogy to all the rules which relate to sales in market overt, that the market itself is not confined to any precise limits. In 2 *Inst.* 713., it is laid down, that the sale must be made in a place that is overt and open, not in a back room, warehouse, &c. and the same rule is laid down in 5 *Co.* 83. That was the case of plate stolen, and sold openly in a scrivener’s shop on market day, as every day is market day in *London* except *Sunday*, in which it was held, that such sale does not change the property ; and after stating the law as to *London*, Lord *Coke* adds, “ Note, reader, the reason of this case extends to all markets overt in *England*.” Now the very exception of a back room or warehouse in the Institute clearly implies, that the sale may be made in every other part of the town where the shops are open, and proves consequently, that the market is not limited by law to any particular part of the town. In *Dixon v. Robinson* (b), where the issue was, whether the bailiff, &c. of *Andover* had power to keep a fair at *Wayhill* in any one place where they pleased, the Chief Justice is reported to have said, “ If the place be not

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(a) 3 *East*, 538.(b) 3 *Mod.* 107.

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limited by the king's grant, they may keep it where they please, or rather where they can most conveniently; and if it be so limited, they may keep it in what part of such place they will;" and in *Carters v. Salkeld*, it was expressly held, that after a formal removal of the market, persons who brought goods to the spot from which the market had been removed would be trespassers; but still, while the lord permitted it, the whole town might be the market. It would indeed be absurd to say, that a sale is not to be considered as having been made within the market, because, on the particular occasion, there were more cattle or goods brought to market than could stand within the limits of the market-place. *Kerby v. Whichelow* (a), however, is an express authority to shew, that corn brought into *the town* to be sold at the market, is to be considered as if it were brought into the market itself. That was trespass for taking three bushels of corn at *Wallingford*. The plea stated a grant by *Car. 2.* to the mayor, &c. of *Wallingford* of a market, and that "the mayor should "have toll of all corn brought, sold, or delivered, or "contracted for, on the market days." Without alleging in the prescription that the corn should be brought *within the market*, the plea then stated, that one *J. F.* brought into the said town (*ad villam illam*) five quarters of barley, to be there sold, and sold it to the plaintiff, and that the defendants took the toll. Replication, that the five quarters of barley were not sold within the market. Demurrer. And judgment was given for the plaintiff, on the ground that no place was alleged where the barley was sold. The defendant's counsel argued,

(a) 2 Lutw. 1498.

that

that it must be intended that it was sold at *Wallingford*, for the prescription was alleged to be at *Wallingford*, the barley was taken to *Wallingford*, and sold on the same day; and, therefore, it must have been sold there. Judgment, nevertheless, was given for the plaintiff, *Powell J.* saying, that the king could not grant a toll for things not brought into the market to be sold, and that the *villa* in that case should be taken for the *market*. This, therefore, is a strong authority to shew, that the whole town may be considered the market. The second essential characteristic of toll is the time. Now, in this case, the plea states, that the corn was both brought into the town and sold on a market-day. Thirdly, as to the sale. The authorities are decisive that toll is not due until the thing is sold. *Leight v. Pym.* (a) Here there is an express allegation of an actual sale, and the toll is in fact paid by the buyer, for it is taken out of the bulk. A decision in this case, in favour of the defendants, will not be inconsistent with any decided case. *Blakey v. Dimesdale* (b) is an authority only to shew, that a distress cannot be taken for goods fraudulently sold out of the market to avoid the toll; but that the party injured must bring a special action on the case. There *Cooper*, on a market-day, sold to *Blakey*, at his house in *Ripon*, thirty-two bushels of wheat, which were at *Cooper's* house, ten miles out of the borough of *Ripon*, to be delivered within a month; within the month the corn was sent, on a market-day, to the plaintiff's house at *Ripon*, and the toll taken when it had got to *Blakey's* house. In that case the corn was never brought into the town to be sold; and, therefore,

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(a) 2 Lutw. 1331.

(b) Cowper. 661.

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there was no pretence for saying that toll was due. In *Hill v. Smith* (a), it was held, that a prescription for toll in respect of goods sold *by sample*, and *afterwards* brought into the market cannot be supported, but that case turned expressly on the mode in which the prescription was alleged, viz. a sale *by sample*, which is of modern introduction, and not the subject of prescription. But this sale was not by sample, for the goods were brought into the market. The buyer and the seller had all the benefit of the market. This case, therefore, is distinguishable, for it is neither a sale by sample, nor so alleged. In *Moseley v. Pierson* (b), an allegation of claim for toll of goods sold in a market, was held to be supported by proof that toll was taken, and goods brought into the market and sold there. It is of great service, not only to the owner of the market, but to the public, that the remedy by distress should be supported, as it avoids a multiplicity of actions. And as the prescription set out in the plea does not break in upon any decided case, and has been found to have existed in point of fact, judgment ought to be for the defendant.

ABBOTT C. J. I think that the rule for entering judgment for the plaintiff, non obstante veredicto must be made absolute. The question raised upon the pleadings has in fact been decided by the opinion of *Powell* Justice, in the case of *Kerby v. Whichelow* (c), and the late case of *Hill v. Smith*, (d) in the Exchequer Chamber. According to those authorities, toll can only be taken in respect of things actually brought into the *market*, and there sold.

(a) 4 Taunt. 520.

(b) 4 T. R. 104.

(c) 2 Lutw. 1498.

(d) 4 Taunt. 520.

It is not necessary here to decide, whether in any case the whole town may be considered as a market, because the plea in this case does distinguish the market from the town. It speaks of the town as the place to which the whole quantity of goods are brought, and it speaks of the market as the place where a portion of the goods only are pitched for sale. On the face of the plea, that portion may be a mere sample, a small quantity which a man may take from his pocket and place on the ground in the market-place. The plea, therefore, having distinguished the town from the market, it appears to me, that the defendant claims a toll for goods not brought into the market for sale, and that being so, then according to the authorities to which I have already referred, that claim cannot be sustained in point of law. The plea, therefore is bad, and this rule must be made absolute.

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HOLROYD J. I am of the same opinion. Upon this plea, it cannot be considered that the whole of the corn was brought into the market, for it expressly states, that the whole was brought into the town, and that only part was brought into the market; the plea therefore, distinguishes between the town and the market. In order to make it a valid plea, it should have stated, that the whole of the goods were brought into the market. In *Hill v. Smith*, the precise point decided was, that a prescription in respect of goods sold by sample in a market, and afterwards brought into the city to be delivered, could not be supported. The foundation of the judgment in that case was, that toll was not due in respect of goods not brought into the market. Lord Chief Justice *Mansfield* says, "The sale by sample has no
con-

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connection with the market; the corn so sold is never brought into the market; and if toll might be demanded for corn so sold, I cannot see why it might not be demanded for any sale whatever contracted for in a market; for the sample is only used to shew the quality of the thing sold." And after observing on the nature of a sale by sample, he says, "The corn is not sold in the market, and the toll to be paid for a sale in a market, is for corn *brought into the market and there sold.*" And then, after citing the 2 *Inst.* 220, and 2 *Inst.* 713., and stating that, the sale by sample is directly contrary to the origin and purposes of markets, he says, "In *Moseley v. Pierson*, the Court said, that the very words, "sold in a market," implied that the thing must be in the market." He then says, "No particular case has been cited, in which there has been an exact decision that toll shall not be taken for goods not brought into a market; but in *Lutw.* 1502. *Powell* J. said, that the king could not grant a toll of things not brought into the market; and Lord Chief Baron *Comyns*, in title *Market*, adopts the doctrine of *Powell*. All the doctrine of sales in market overt militates against any idea of a sale by sample, for a sale in market overt requires that the commodity should be openly sold and delivered in the market; and Lord *Coke* so says in his 5 *Rep.* 82. and that every part of both the treaty and completing of the sale must be in the market overt." The reasoning of Lord Chief Justice *Mansfield*, in *Hill v. Smith*, was, that no toll could be due upon a sale by sample, because no toll was due at common law for goods not brought into market. That case is an authority to shew, that no toll was due in this case, for the corn which is alleged in the plea to have been brought into the

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town only, and not into the market. I think therefore that this rule must be made absolute.

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BEST J. I am of the same opinion. In the case of *Hill v. Smith*, which has been so fully commented upon by my Brother *Holroyd*, it was decided, that toll is not due, except for property actually brought within the market. Now upon this plea, it is perfectly clear, that only part of the property was brought into the market, and the remainder was kept without the market, and sold without the market. If the distress were taken in respect of corn sold without the market, for which no toll was due, it cannot be supported. The cases referred to in argument only shew, that a market and town may be co-extensive, and that unless the lord of the market is limited to hold his market in some particular place in the town, he may hold it in any part of the town he pleases; but they do not shew that he will then have a right to claim toll for goods in that part of the town which is not a market. Those cases, therefore, are not in point; for the question here is, not whether the Marquis of *Buckingham* had a right to appoint a particular place as the market, but whether the whole of the corn was brought into the market. It is stated in the plea, that part of the corn was out of the market, and that being so, I am of opinion that the plea cannot be supported, and, consequently, that this rule must be made absolute.

Blossett Serjt., *Storks*, and *Dover* were to have argued in support of the rule.

Rule Absolute. (a)

(a) *Bayley J.* was absent.

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BEALE, surviving Partner of LONG, *against*
NIND.

A party, on being asked for the payment of his attorney's bill, admitted that there had been such a bill; but stated that it had been paid to the deceased partner of the attorney, who had retained the amount out of a floating balance in his hands. Quære, whether, in order to take the case out of the statute of limitations, evidence is admissible to shew that the bill had never in fact been paid in this manner.

Semble, that such evidence is admissible, if at all, only where the defendant states the debt to be discharged by particular means, to which he refers with precision, and where he has designated the time and mode so strictly that it is impossible it could be discharged in any other manner than that specified.

ASSUMPSIT by plaintiff, as surviving partner of *Long*, deceased, for work and labour as attornies and solicitors. Plea first, non-assumpsit; 2dly, non-assumpsit infra sex annos; 3dly, set-off. At the trial, before *Richardson J.*, at the *Worcester* summer assizes, 1820, it appeared that the action was brought by the plaintiff, as surviving partner of *Long*, to recover 323*l.*, the amount of their bill for business done from *January*, 1810, to the 28th of *April*, 1812. *Beale* and *Long* dissolved partnership at the end of 1812, and *Long* died in 1817. To take the case out of the statute of limitations, it was proved that in *June*, 1819, the defendant came to *Beale's* office, when the latter said, "Mr. *Nind*, I believe there is a bill due from you to *Long* and *Beale*." *Nind* said, "He believed there had been a bill, but that they had received the money, and that there was a balance due to him from *Long's* executors." *Long* was also a partner in a banking concern, but *Beale* had nothing to do with that. At a subsequent meeting *Beale* said to *Nind*, "If you have paid this bill to *Long* and *Beale*, I have received no account of it, and I shall not be satisfied till you shew me the receipt, and I shall proceed." *Nind* said, *Long* had always a floating balance in his hands, and that he had paid himself. The plaintiff called a clerk of the banking-house in which *Long* was concerned, who proved the state of the accounts between *Nind* and *Long* for three years previous to *March*, 1812. *Nind* had

had a private account with *Long*, and *Long* had received money of *Nind* on account of the sale of an estate, and on the 9th *July*, 1811, the account was settled, and *Nind* was paid the balance to that time. Afterwards 2500*l.* was paid in on account of *Nind*, which he drew out. The bill of *Long* and *Beale*, for business done, was never brought into the banking account, and the balance was finally against *Nind*. On the part of the defendant, evidence was given of payments made to *Long* in 1810 and 1811, one of which only, viz. 2500*l.*, was subsequently to the 9th *July*, when the accounts were settled. The learned Judge told the jury, that if the conversation of the defendant referred to the private account with *Long*, and there was no other account with him than that produced, the defendant appeared to be mistaken in supposing that the balance was in his favour; and he left it to the jury to consider, whether the plaintiff's demand was satisfied by payment or set-off, and the jury found a verdict for the defendant. A rule nisi having been obtained in last *Michaelmas* term, on the ground that this was a verdict against evidence,

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Jervis and *Puller* now shewed cause. In *Swann v. Sowell* (a), it was expressly held, upon a plaintiff's shewing the defendant a promissory note within six years, and the latter saying, "You owe me more money, I have a set-off against it," that that was not sufficient to take the case out of the statute. Although *Best J.* differed from the rest of the Court, yet he said, that "if the witness had said that the defendant had acknowledged

(a) 2 B. & A. 759.

that

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that the debt once existed, but added that it was *paid*, he should have nonsuited the plaintiff; because payment destroys the original debt, and may be given in evidence under the general issue; but a set-off does not destroy the original debt, and cannot be given in evidence without a plea or a notice of set-off. Here, the defendant said that the debt had been paid, and besides, there is a plea of set-off." That case is, therefore, expressly in point, and the plaintiff here ought not to have been permitted to contradict a part of the defendant's statement. Besides, in this case, the defendant alleged, that *Long* had paid himself out of a floating balance in his hands. The plaintiff's evidence only went to shew, that he had not paid himself previous to 1812, and there is no evidence as to what took place at a subsequent period.

W. E. Taunton and Campbell, contra. The defendant has admitted, that the debt once existed, and has added, that it was discharged by a particular mode of payment. Then it was competent to the plaintiff to shew, that it was not so discharged, according to the opinion of *Gibbs C. J.* in *Hellings v. Shaw.* (a) The defendant alleged that *Long* had paid himself out of a floating balance in his hands. It was expressly proved, that the account between *Long* and *Nind* had been settled in 1811, and that this bill had never been brought into the account.

ABBOTT C. J. I am by no means satisfied upon proof of the conversation held with the defendant, that it was competent to the plaintiff to go into the whole of

(a) 7 Taunt. 608.

the accounts between *Long* and the defendant, to falsify what the latter said. Admitting, however, that that could be done, it is not made out to my satisfaction, that the defendant's assertion, that this matter had been settled between *Long* and him, was untrue; and I cannot therefore say, that the jury have come to a wrong conclusion. The rule must therefore be discharged.

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BAYLEY J. The onus of taking a case out of the statute of limitations is upon the plaintiff. In order to do so in this case, he proves a conversation, which perhaps is the worst description of evidence upon such a subject. The substance of it is, that although there was once a debt, yet that debt had been discharged by the fact of *Long*, the deceased partner, having paid himself, out of money in his hands belonging to *Nind*. It is contended, that the plaintiff has a right to falsify that allegation of the defendant; and that by so doing, there remains an acknowledgment of a debt, which is an answer to the statute of limitations. The only authority applicable to this point, is certainly a very great authority, viz. that of Lord Chief Justice *Gibbs*, in the case of *Hellings v. Shaw* (a). After lamenting that the Courts have not confined themselves to the words of the statute, he proceeds thus: "There are three cases in which the words of the statute would discharge the defendant, but in which the Courts have held him liable. One is where the defendant has admitted, that the debt is unpaid, but has stated that it was discharged by the lapse of time; another is, where the defendant has stated, not that the debt remained due, but that it is discharged by a particular means to which he has

(a) 7 *Trent*. 612.

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with precision referred himself, and where he has designated that *time* and *mode* so strictly, that the Court can say it is impossible it had been discharged in any other mode: there the Courts have said, that if the plaintiff can disprove that mode, he lets himself in to recover, by striking from under the defendant the only ground on which he professes to rely." (a) I certainly am not aware of the cases to which my Lord Chief Justice *Gibbs* refers to support that proposition; but, admitting that proposition to be true, I think that this case does not fall within it. The defendant here has not stated that the debt was discharged by particular means, to which he has with precision referred. He has not designated the time and mode so strictly that the Court must say it is impossible it can have been discharged in any other mode. The defendant has only stated, that *Long* had paid himself out of a floating balance in his hands. It is not stated either when he paid himself, or when the floating balance was in his hands. It is said that the allegation that *Long* had paid himself out of the floating balance is false, because in fact he had not paid himself out of that floating balance which was in his hands up to *March*, 1812. It is not inconsistent with *Nind's* declaration, that subsequently to *March*, 1812, he had money in *Long's* hands, or that *Long* had paid himself after that period. I am aware that the partnership between *Long* and *Beale* was dissolved in *March*, 1812, but a payment on account of the partnership to either party after that period would be a payment to both; and I am strongly inclined to believe that this debt was paid by *Nind* to *Long*, and that *Beale* knew it; for it appears in evidence that

(a) But see the judgment of *Gibbs* C. J. as reported in 1 *B. Moore*, 344. where he confines his observation to the case of a defendant claiming his discharge under a written instrument, to which he with precision refers.

Long

Long was the person with whom *Nind* was in the habit of transacting his business. *Beale* and *Long* were at variance with each other; but unless the latter had stated to *Beale* that *Nind* had paid him the money, I think it probable that *Beale* would not have suffered so large a sum as 323*l.* to have been outstanding in the hand of the defendant for so long a period.

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HOLROYD J. I think that, after the declaration of the defendant, the evidence given was not sufficient to take this case out of the statute of limitations. Admitting that the proof given by the plaintiff is admissible in evidence, still the defendant alleges that payment had been made of his bill to *Long*, by the latter retaining the amount out of a floating balance which had been in his hands. Now the assertion of his having paid it is not inconsistent with the evidence, for he might have paid the balance due on the bill without having it entered into any account at all. If the defendant *Nind* had said, "*Long* has paid himself, and you will find an item of that payment in the account at the bank," then, supposing this proof to be admissible (with respect to which I give no opinion), and that it had been proved that no such item was in that account, it would have falsified the statement which *Nind* had given, and left the rest of the evidence as true; and then the question would arise, whether the case was taken out of the statute of limitations. There is, however, no evidence to disprove the truth of any thing he stated. I think, therefore, that there ought not to be a new trial.

BEST J. I am clearly of opinion that there is not sufficient evidence in this case to negative the fact

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alleged by the defendant. The declaration is not, as it is supposed to be, an assertion that the money was paid into the banking account; but, generally, that although there was a bill, it had been paid. It might have been paid in any other mode than through the medium of a banker. Now, here, if the declaration could be falsified at all, it must be falsified by clear and precise evidence; but the evidence only goes to shew that there was not any payment of it entered in the banking account. That does not by any means establish that *Long* might not have retained some of *Nind's* money, and not have entered it in that account. I think, therefore, that there ought not to be a new trial.

Rule discharged.

WRIGHT *against* STEPHENS.

Where a testator bequeathed all his houses and premises in *W.* to his wife, for life; and, at her decease, to go to his eldest son, or surviving sons; and, in lack of sons, to daughters; and his copyhold land at *L.* to his eldest son; and, in case of his decease, to the eldest, and so on in rotation; and, in lack of sons, to daughters; and directed his personal property to be equally divided among the remaining children: Held, that the son, who, at the death of the testator, was the eldest, under the will, and as heir at law, took a fee in the premises at *W.*, subject to his mother's life-estate, and a fee in the copyhold land at *L.*

THE Master of the Rolls sent the following case for the opinion of this Court. *Thomas Stephens* duly made, signed, and published his will, which was duly attested by three witnesses, and of which the following is a copy. "This is the last will and testament of *Thomas Stephens*, of *Tynemouth*, in the county of *Northumberland*, ship-owner. I bequeath to my dear beloved wife, all those houses and premises in the township of *Whitley*, with all plate and furniture; 100*l.* per annum for her life, and, at her decease, to go to my eldest son or surviving sons; and in lack of sons, to daughters: To my eldest son, *Charles*, I leave the copy-

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hold land at the *Links* and the *Moor*, and freehold houses at *Cullercoats*; and in case of his decease, to the eldest, and so on in rotation; and in lack of sons, to daughters. All my shipping, and other money proper, are to be equally divided, share and share alike, among the remaining children, to be paid them when they arrive at the age of 21 years, share and share alike, their mother to have the bringing of them up, until they arrive at maturity; I allow for the same. I appoint for my executors, *D. S.*, of *London*, *J. C.*, of *Tynemouth*, and *Z. S.*, of *Whitley*; and the said *Jane Stephens*. The copyholds were duly surrendered to the use of the will. The testator died, leaving *Jane Stephens*, his widow, and *Charles Rutherford Stephens*, his eldest son and heir at law, and also his customary heir. The question was, what estate or interest *Charles Rutherford Stephens*, the eldest son and heir at law, and customary heir of the testator, took under his will, or as heir at law or customary heir, in the copyhold houses and premises in the township of *Whitley*, and the copyhold lands at the *Links* respectively. The case was argued in last *Easter* term by

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Hone, for the plaintiff. There are two sets of limitations in this will, one with respect to the houses at *Whitley*, the other to the lands at the *Links*. The Court must, in this case, look at the whole will, inasmuch as the objects of the testator's bounty, in reference to his personal property, are called "the remaining children," but whether those remaining children were intended to consist of sons and daughters, or daughters only, cannot be discovered, till the Court points out those who are to take under the previous devises of the realty. The testator first devises to his wife for life, and after her

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death, to his eldest son or surviving sons; and in lack of sons, to daughters. This is as to the houses at *Whitley*. Then, as to the lands at the *Links*, he devises them first to his eldest son, *Charles*, and in case of his decease, to the eldest, and so on in rotation; and in lack of sons, to daughters. The difficulty arises from the introduction of the words "eldest son or" in the devise of the *Whitley* premises. If those words are rejected, the whole will is rendered intelligible, and the ambiguity which otherwise occurs as to the personalty, will be avoided, by giving *all* the sons a vested interest as joint-tenants for life, for there are not any words of limitation or inheritance added to the devise of this or the *Links* property. If, however, the Court should consider, that no incongruity arises by retaining the words "eldest son or," then the limitation over to the eldest son or surviving sons, will be a contingent remainder in favour of the eldest, if living at the death of his mother, or if dead, then of such other sons as may survive their mother and eldest brother; and this being copyhold, the contingent remainder cannot be destroyed by the act of the particular tenant and the reversioner. As to the land at the *Links*, it is clear the testator meant that all his sons should take for life in succession. *Lord Douglas v. Chalmer* (a) is an authority to shew, that the words "in case of his decease," are to be considered as tantamount to "at, or from his decease:" and this case was recognized in *Webster v. Hales*. (b) The result is, that the eldest son takes a vested interest for life, jointly with the other sons, in the houses at *Whitley*; and as to the lands at the *Links*, all

(a) 2 Ves. jun. 501.

(b) 8 Ves. 410.

the sons take in succession for life. The reversion in fee as to each estate, is admitted to be in the eldest son.

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Sugden, contra, contended, that the heir at law took a fee in the houses, subject to the life-estate of his mother, and a fee in the lands at the *Links*. The gifts are substitutionary. The testator meant that the eldest son should take; but if he died before the testator, then that the next should be substituted for him. Then, at the testator's death, it would be finally decided, and the then eldest son would take the fee, and the other devises over would be altogether at an end. In construing a will, when the only question is to ascertain the intention of the testator, there is no case which says that there is any distinction between real and personal property. In *Forth v. Chapman* (a), the case turned on a settled rule of law. Here, the devise is both of personal and real property; and the authorities, as to the construction of such a will, with respect to personal property, are decisive. The words "in case of his decease," must mean, in case of his decease in the lifetime of the testator. *Lowfield v. Stoneham* (b), *Webster v. Hales* (c), *Doe v. Sparrow*. (d) These, therefore, are authorities to shew, that the Court ought, in this case, as to the real property also, to come to the same conclusion. The bequest to the remaining children is strong, to shew what the testator's intention was; for it must be ascertained at his death who they were, and they must be the children who at that period remained, exclusively of the eldest son, who

(a) 1 P. Wms. 663.

(b) 2 Str. 1261.

(c) 8 Ves. jun. 410.

(d) 13 East, 359.

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was to have the lands. But if it could be supposed, that the testator intended, that, after this, these children were also to take the lands in succession, it would interfere with this devise, and make it altogether unintelligible. Either, therefore, the eldest son takes a fee under the will, or he takes an estate for life under the will, with the reversion in fee, as heir at law; the other gifts being substitutionary and at an end, on the event of his surviving his father.

Hone, in reply. As to *Lowfield v. Stoneham*, the only point stated by the books to have been ruled in that case is, that parol evidence cannot be admitted to contradict a will in which a testator's intention is clearly expressed. In *Webster v. Hales*, the Master of the Rolls distinguished the devise from *Lord Douglas v. Chalmer*. And although he determined the last bequest, which was in the same terms with that case, contrary to it, he did it only on the ground, that it was found in company with two prior devises which were clearly distinguishable. In the case of *Doe v. Sparrow*, there were other words, viz, "in case my son and daughter shall both be dead *at the time of my decease*," which were much relied on by the Court in giving judgment. That case is, therefore, very distinguishable from the present, for here the testator expressly gives the *Whitley* premises over to his eldest son, or surviving sons, at the decease of the mother, thereby himself marking out the time at which the devise over was to take effect; and the decision in *Lord Douglas v. Chalmer* has put the construction contended for upon the words "in case of his decease" in the devise of the lands at the *Links*.

Cur. adv. vult.

The

The following certificate was afterwards sent.

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against
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The best opinion that we can form on so obscure a will is, that under the will and as heir at law, *Charles Rutherford Stephens* takes a fee in the copyhold houses and premises in the township of *Whitley*, subject to the life estate of his mother : and the copyhold lands at the *Links* in fee.

C. ABBOTT.

J. BAYLEY.

G. S. HOLROYD.

W. D. BEST.

BARKER *against* **RICHARDSON** and Another.

Friday,
June 22d.

DECLARATION stated, that the plaintiff was lawfully possessed of a messuage and dwelling-house, with the appurtenances, in the city of *Norwich*, in which there were two ancient windows, through which the light and air ought to enter, for the convenient use and enjoyment thereof; yet that defendants, well knowing the premises, but contriving, &c., unlawfully and injuriously erected and raised a certain building, near to the said windows, by means whereof the premises of the plaintiff were darkened. Plea, not guilty. The cause was tried before *Dallas C. J.*, at the *Norwich* Summer assizes, 1820, when the following facts were proved.

Where lights had been enjoyed for more than twenty years contiguous to land, which within that period had been glebe land, but was conveyed to a purchaser under the 55 G. 3. c. 147., it was held that no action would lie against such purchaser for building so as to obstruct the lights, inasmuch as the rector, who was tenant for life, could not grant the easement, and therefore no valid grant could be presumed.

The plaintiff's windows had existed more than 20 years. The defendants had erected the building which occasioned the darkening of the plaintiff's windows upon their adjoining land, which had been glebe land,

R r 4

belong-

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belonging to the rectory of *Saint Edmund*, but within the last six years had been conveyed in exchange to one *John Brereton*, by the then rector, with the consent of the bishop and patron, under the authority of the 55 Geo. 3. c. 147., and by *Brereton* conveyed to defendants. It was objected, on the part of the defendants, that although, after uninterrupted possession of an easement for 20 years, the law will, in ordinary cases, presume a grant, yet that rule extended only to those cases where the presumed grantor was capable of making a grant. In this case, the rector, who was a mere tenant for life, had no power to make such grant, and therefore length of time could not operate against him, who was not seised of any estate of inheritance. *Daniel v. North (a)*, 2 Saund. 175. note (c), *Rayner on Tithes*, vol. ii. 548. were cited. *Dallas C. J.* directed the jury to find a verdict for the plaintiff, reserving liberty to the defendants to move to enter a nonsuit, if the Court should be of opinion that 20 years' possession was not sufficient, under the circumstances of this case, to entitle the plaintiff to maintain this action. A rule nisi having been obtained by *Blasset Serjt.*, in last *Michaelmas* term,

Scarlett, Firth Serjt., and *Cooper*, now shewed cause. A grant is not necessary to entitle a man to build upon his own land. The right to light or water is acquired by use. If a mill had continued for 50 years erected upon water which passes through glebe land, the clergyman surely could not stop the water from running to the mill. In this case it might fairly be presumed, that

(a) 11 East, 372.

the house was built upon the site of an old house, existing before the restraining statutes, or before the land had been granted to the church. The case of *Daniel v. North* only decided, that a landlord is not to be precluded by presuming a grant against him, without evidence of his actual knowledge of the fact of the light having been put out, and enjoyed above 20 years during the occupation of the opposite premises by his tenant. A rector, too, is something more than a mere tenant for life, for he may maintain an action for waste, the gist of which is the injury done to the inheritance; *Com. Dig. tit. Waste*; and Lord Coke (a) even states it as a doubtful question, in whom the fee simple of the glebe is. Assuming, however, that the parson has not the fee simple of the glebe in him, yet, by the common law, he is invested with nearly all the powers of a tenant in fee, and he may well have the power of granting to persons the liberty to build upon the land adjoining to the glebe; and if the rector had such a power, it may be presumed, with respect to a building situated in the middle of a populous city, that he had exercised it in favour of those who had had the uninterrupted enjoyment of the light and air for 20 years.

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ABBOTT C. J. I am of opinion, that the rule for entering a nonsuit must be made absolute. The only point reserved for the opinion of this Court is, in effect, whether a licence, if presumed, would be valid in law. There was no evidence, at the trial, from which the jury might presume that this was an ancient house, or built on the site of an ancient house, or that the window was

(a) *Co. Litt.* 341. a.

there

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there before the adjoining land had been granted to the church, nor was that point ever made. Admitting that 20 years' uninterrupted possession of an easement is generally sufficient to raise a presumption of a grant, in this case, the grant, if presumed, must have been made by a tenant for life, who had no power to bind his successor; the grant, therefore, would be invalid, and consequently, the present plaintiff could derive no benefit from it, against those to whom the glebe has been sold. For the purchasers bought all the rights belonging to the land at the time of sale. I am therefore of opinion, that the evidence in this case was not sufficient to entitle the plaintiff to maintain this action. The rule, therefore, for entering a nonsuit must be made absolute.

Rule absolute.

Saturday,
 June 25d.

MANFIELD and Another *against* MAITLAND.

Where the memorandum for charter stated one half of the freight to be paid in cash on unloading and right delivery, and the remainder by bill on London at four months' date; and then, after containing stipulations for unloading, discharging, demurrage, &c.

ASSUMPSIT on a policy of insurance on the ship *Agenoria*, and upon all kind of goods, &c. from *Quebec* to *London*. By a memorandum at the foot of the policy, the insurance was declared to be on a bill of exchange for 219*l.*, drawn by the master on plaintiffs, dated *Quebec*, 3d November, 1819. Plea general issue. The defendant paid the premium into Court. At the trial at the *Guildhall* sittings after last *Easter* term, before *Abbott* C. J., the facts appeared to be as follows.

added, "the captain to be supplied with cash for the ship's use;" and, in pursuance of the last stipulation, the master drew a bill on the freighters, which was duly accepted and paid: Held, that this was not to be considered as a payment of freight in advance, but as a loan to the owner of the ship, and that (the ship having been lost on her homeward voyage) the freighters had no insurable interest in such bill.

By

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against
MAITLAND.

By a memorandum of charter party, dated 24th *June*, 1819, between Mr. *John Rattenbury* the owner and the plaintiffs, it was agreed, that the ship should proceed from *London* to *Quebec*, and there take on board a cargo of deals, with staves for broken stowage, and with them proceed to *Bridgewater*, and deliver them on being paid freight for the deals, 10*l.* 5*s.* per hundred, per *St. Petersburg* standard hundred, and for the staves, 6*l.* per 1000, &c. one half of the freight to be paid in cash on unloading and right delivery of the cargo, and the remainder by bill on *London*, at four months' date. Thirty running days to be allowed for loading and discharging, and ten days' demurrage at 4*l.* per day. Penalty for non-performance 800*l.* The captain to be supplied with cash for the ship's use. In pursuance of this last stipulation, the master drew the bill of exchange in question, for 219*l.*, value received, for the use of the ship *Agenor*, on the plaintiffs, which was duly accepted and paid. The ship was lost in her homeward voyage. The Lord Chief Justice was of opinion, that the plaintiffs had no insurable interest, and directed a nonsuit. And now

Campbell by leave moved to set aside this nonsuit, and to enter a verdict for the plaintiffs. The question here is, whether the plaintiffs had an insurable interest. Here the plaintiffs were the acceptors of the bill of exchange in question, which was duly paid by them at maturity. And this distinguishes the case from *Tasker v. Scott*, 6 *Taunt.* 234., where the insurance was effected by an indorsee of the bill. The real point is, whether this is to be considered as a loan to the owners of the ship, or as a part payment of freight in advance. If the latter, then it is a mere insurance

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insurance on freight. Upon looking at the whole of this charter-party, it must be considered as substantially money advanced in anticipation of freight. The freight is to be paid one half in cash on unloading, and the remainder by a bill at four months, and then comes the clause, the captain to be supplied with cash for the ship's use. It does not even say where, or by whom, or on what terms he is to be supplied. The reasonable construction, however, is, that he is to be supplied by the charterer who was to deduct it from the freight due. In *De Silvale v. Kendal* (a), a similar provision was made in the charter-party, and the money advanced was there held to be part of the freight. It is true indeed, that the provision is there in a different part of the charter-party, which was a formal instrument under seal. Here it is a very informal and loose memorandum for charter, and the mere alteration of the position of a clause in such an instrument ought not to have much weight. This then must be considered as freight, *Andrew v. Moorhouse* (b), and then there is no doubt the plaintiffs had an insurable interest.

ABBOTT C. J. The case of *De Silvale v. Kendall* turned upon the particular words of the instrument; by which it was provided, that the freight was to be paid as follows, viz. One hundred and twenty pounds *British* sterling for freight of the outward cargo to *Maranham*, and as much cash as may be found necessary for the vessel's disbursements in *Maranham*, to be advanced by the freighter to the ship-owner when required, and the residue of such freight to be paid on delivery of the cargo in *Liverpool*. So that, in that case it appears,

(a) 4 M. & S. 37.

(b) 5 Taunt. 455.

that

that the instrument was studiously framed, so as to make the freighter lose the money advanced by him, unless the owner reaped the benefit by the ship's coming home safe. The present charter-party, however, is in a very different form. It is undoubtedly competent for the owner to make such a stipulation as that in *De Silvale v. Kendall*. But if he does so, it is his duty to take care that it is inserted in clear and explicit words in the charter-party, that the money advanced shall be an advance in part payment of the freight. As there are no such words in this instrument, I cannot consider these advances as a part payment of the freight; for in so doing, I might be making a new contract between the owner and the freighter, to which the latter might object. These stipulations are by no means uncommon; for the owner of a ship frequently has no agent at the port of loading, but the freighter always has, and therefore, naturally enough, stipulates to advance money to the owner, which, upon the ship's safe arrival, is as naturally in practice deducted from the freight. There is, however, in this charter-party, a total absence of any expression implying that this money advanced shall be part of the freight. If so, the owner is liable for it to the freighter as for a debt, and the latter has not any insurable interest, and in that case the nonsuit is right.

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BAYLEY J. I am of the same opinion. If the memorandum of charter-party in this instance had clearly expressed, that the money advanced should be in part payment of the freight, then it would follow, that the loss of the ship would produce a loss of the money advanced to the freighter, and he would have an insurable interest

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interest in it. But, if that be not so, and it be only a loan by the freighter, he would have no insurable interest, having a remedy against the owner for the debt. Now, if it had been the intention of the parties, that it should be a part payment of the freight, one would naturally have expected that the memorandum of charter-party would have been differently worded. The clause which speaks of these advances is altogether silent, as to the terms of the supply, or the person by whom it is to be made. In fact it comes to no more than this, a stipulation that money shall be advanced to the captain for the ship's use. In the previous part of the instrument, there is an express stipulation as to the manner in which the freight is to be paid, but it is altogether silent as to any deduction for the advances from the freight. The stipulation is, that one half of the freight shall be paid in cash on unloading, and the remainder by a bill on *London* at four months' date. Now instead of this, there would have been added, "deducting thereout the money previously advanced," if such deduction had been intended to be made. It seems to me, therefore, that in the absence of any such stipulation, this was money to be advanced as a loan by the freighter, which he might, in case freight was afterwards earned, deduct from the freight; but for which, if no freight was earned, he had still his remedy over against the owner, and in that case it is admitted, he had no insurable interest.

HOLROYD J. In this case, the money advanced was money paid by the freighter for the benefit of the owner, which would constitute a debt due from the owner. Now we ought not to construe this instrument so as to
alter

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alter this state of things, unless we can very clearly collect from it, that such was the intention of the parties, and as that cannot be done here, the nature of the supply and the rights of the parties ought to remain the same, whether the ship earns freight or not, and we cannot construe the instrument, as stipulating that the money advanced was to be deducted from the freight without making a new contract for the parties. It seems to me, that the case of *De Silvale v. Kendall* is directly against the plaintiff. There the parties agreed, that the freight should be paid in a particular manner, and the money advanced there, was stipulated to be part of the freight, and Lord *Ellenborough's* judgment proceeded on that ground, for he says, that it is competent for the parties to covenant by express stipulations, in such manner as to control the general operation of law, and he then puts the case, whether the parties had not so covenanted by the stipulations of the charter-party there, and the words of *Dampier J.* are very strong, for, after stating that it had been argued from the words of the charter-party there, that as much cash as might be found necessary for the vessel's disbursements in *Maranham*, to be advanced by the plaintiff to the defendant, imported a loan of money and not a payment of freight; he adds, "and if those words stood alone unexplained by the other part of the clause, I should have thought they might have been subject to such a construction." Now here they do stand alone and unexplained. That case therefore fortifies our decision in the present case. I think, therefore, the nonsuit was right.

Rule refused. (a)

(a) *Bent J.* was absent from indisposition.

1821.

Saturday,
June 23d.

DOE, on the Demise of HALL and Another,
against BENSON.

Upon a parol demise, rent to take place from the following *Lady-day*, evidence of the custom of the country is admissible to shew that by "*Lady-day*" the parties meant "*Old Lady-day*."

EJECTMENT for certain premises at *Weston*, in the county of *Lincoln*. At the trial at the last *Lincoln* assizes, before the Lord Chief Baron, it appeared that the defendant had hired the premises in question in *December*, 1818, at three guineas a year rent, to take place from the following *Lady-day*; the notice to quit was served on the 9th of *October*, 1819, to quit on the old *Lady-day* following: evidence was given to shew, that the general custom of the country in reserving rents, was to reserve them from old *Lady-day*; the jury, under the direction of the Lord Chief Baron, found a verdict for the lessors of the plaintiff. *Clarke*, in last *Michaelmas* term, having obtained a rule nisi for a new trial,

Reader (*Vaughan*, Serjt. was with him) shewed cause, and contended that the custom of the country was properly admitted in evidence, to explain the original agreement. The expression, *Lady-day*, is ambiguous, it may mean either new *Lady-day* or old *Lady-day*, and he referred to *Furley, dem. The Mayor of Canterbury, v. Wood* (a). In *Doe v. Lea* (b), the letting was by deed, which distinguishes that case from the present.

Clarke contra. *Lady-day* is not an ambiguous expression, for ever since the act of parliament for alter-

(a) *Runnington on Ejt.* 112. 1 *Exp. N. P. C.* 198. *S. C.*

(b) 11 *E.* 312.

ing

ing the style, it has been fixed by law to mean the 25th of *March*, there was therefore no ground for admitting the evidence of the custom. If, indeed, the original agreement had been, that the rent should be reserved, "from *Lady-day*, according to the custom of the country," it would have been different.

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DOE, dem.
HALL,
against
BENSON.

ABBOTT C. J. The real question in this case is, what the parties meant when they used the expression, *Lady-day*, in their original agreement; and whether we are at liberty to ascertain that by extrinsic evidence. In *Doe d. Spicer v. Lea*, the letting was by deed, and the rule of law is, that evidence is not admissible to explain a deed. Now reading the deed in that case, as lawyers, the Court could not but consider *Lady-day* there as meaning new *Lady-day*. But in the nisi prius case of *Furley, dem. Mayor of Canterbury, v. Wood*, which was cited there, and not disapproved of, where the letting was by parol, evidence of the custom of the country was admitted by Lord *Kenyon*. I think that was a correct decision; and I am therefore of opinion that, in this case also, the evidence of the custom of the country was properly admitted, and that the verdict was right.

BAYLEY J. This is the case of a letting by parol, and the question is, what was the meaning of the parties, when they used the word *Lady-day*. In common parlance, it is an equivocal term, where, therefore, there is a custom in the country respecting it, I think it ought to be considered as used *prima facie* consistently with that custom. I think, therefore, that the evidence was receivable, and that the case was properly left to the jury.

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—
Doe, dem.
HALL,
against
Benson.

HOLROYD J. I am of the same opinion. The case of *Doe v. Lea* was decided upon a principle of law, not applicable to this case. For there the letting was by deed, which is a solemn instrument, and therefore parol evidence was inadmissible to explain the expression *Lady-day*, there used, even supposing that it was equivocal. But that principle does not apply to the present case, where the letting being by parol, the party is at liberty to explain the words used, by evidence of the custom of the country. The verdict therefore is right.

Rule discharged.

Monday,
June 25th.

CROFT and Another *against* ALISON.

Where the plaintiffs hired a chariot for the day, appointed the coachman, and furnished the horses: Held, that they were properly described as owners and proprietors of it, in a declaration against a defendant for an accident arising from his servant's negligence in driving against the chariot.

Held, also, that where defendant's servant wantonly,

and not in order to execute his master's orders, strikes the plaintiffs' horses, and thereby produces the accident, his master is not liable; but where, in the course of his employment, he so strikes, although injudiciously, his master is liable.

THE declaration stated, that the plaintiffs were the owners and proprietors of a certain chariot, then lawfully being and standing in a certain public highway, and that the defendant was possessed of a certain coach and horses, under the care and government of a servant, who was then driving the same along the highway; and that the defendant, by his said servant, so carelessly and improperly drove, governed, and directed his said coach and horses, that, by the carelessness, negligence, and improper conduct of the defendant, by his servant, one of the fore-wheels of the coach struck, and damaged the said chariot. Plea, general issue. At the trial, it

appeared that the plaintiffs, who were livery-stable keepers, had hired the chariot for the day of Messrs. *Lam-*

bert

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 CROSS
 against
 ALISON.

bert and *Bryant*, who were coach-makers. The plaintiffs furnished the horses, and appointed the coachman, and then let it out to an individual for the day. It was stated in evidence, that the cause of the accident arose from the defendant's coachman striking the plaintiffs' horses with his whip, in consequence of which they moved forward, and the chariot was overturned. At the time when the horses were struck, the two carriages were entangled. The Lord Chief Justice, at the trial, left it to the jury to determine, whether the carriages had become entangled from the moving of the horses of the plaintiffs, which, previously to the accident, were standing still and without a driver, and he directed them to find for the defendant, in case they thought so, and that the whipping by the defendant's coachman was for the purpose of extricating himself from that situation. But he directed them to find for the plaintiffs, in case they were of opinion, that the entangling arose originally from the fault of the defendant's coachman. The jury found a verdict for the plaintiffs. And now

Scarlett moved for a new trial. First, the plaintiffs cannot properly be called the owners and proprietors of the chariot, having only hired it of the real proprietors for one day; and if any but the real proprietors can be so called, the individual actually using the carriage at the time, might be much more properly called so than the present plaintiffs. Secondly, the injury arose from the act of the defendant's coachman, in whipping the plaintiffs' horses; now that was a wanton act on his part, for which he himself, and not his master, would be liable; and the declaration which charges, that, by the carelessness, negligence, and improper conduct of the defend-

1821.

CROFT
against
ALISON.

ant's servant, the accident happened, is not supported by the proof of a wanton act.

Per Curiam. As to the first point, it has never been supposed that a mere passenger in a carriage can be considered as the owner and proprietor, so as to be entitled to bring this action. The plaintiffs, however, are something more, for they have not only hired the chariot for the day, but have appointed the coachman and furnished the horses. They may, therefore, be considered, for the purposes of this declaration, as the owners and proprietors of the chariot. As to the second point, the distinction is this; if a servant driving a carriage, in order to effect some purpose of his own, wantonly strike the horses of another person, and produce the accident, the master will not be liable. But if, in order to perform his master's orders, he strikes but injudiciously, and in order to extricate himself from a difficulty, that will be negligent and careless conduct, for which the master will be liable, being an act done in pursuance of the servant's employment. The case, therefore, has been properly left to the jury.

Rule refused. (a)

(a) See *Macmanus v. Crickett*, 1 East, 106.

Monday,
June 25th.

STURDY *against* HENDERSON.

A promissory
note, payable
two months af-
ter sight, re-
quires a stamp
appropriated to
a note payable more than 60 days after sight, or two months after date, date and sight not being in this case synonymous.

ASSUMPSIT upon a promissory note, dated *July 7*.
1818, for 400*l.*, payable two months after sight to
S. B. J. or order. Plea, general issue. At the trial

before

before *Abbott C. J.*, at the last *Guildhall* sittings, the note, when produced, appeared to be upon a six shillings stamp. It was objected, that this was a promissory note for the payment of money at a time *exceeding two months after date, or sixty days after sight*, and that it required a stamp of 8s. 6d. The learned Judge, being of that opinion, directed a nonsuit. And now

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STURDY
against
HENDERSON.

Marryat moved for a rule nisi to set this nonsuit aside. And he contended, that, in a promissory note like this, sight and date are synonymous, for no place is fixed upon in the note where it is to be presented for sight; and therefore the two months must be calculated from the date. If so, the stamp is quite sufficient; for although undoubtedly it is a note payable more than sixty days after sight, yet it is not payable more than two months after date.

Per Curiam. This is a note payable more than two months after date; for the two months after sight do not begin to run from the day of the date, but from the day of the note being presented for sight, and that is the practice in bank post bills. This rule must, therefore, be refused.

Rule refused.

1821.

Tuesday,
June 26th.

TENNANT *against* MACKINTOSH.

Where a return cargo belonging to plaintiff had been consigned by the defendant to *B. and W.*, to be held at the orders of defendant, who had a lien on it, and such cargo had been sold by *B. and W.*, and the lien satisfied: Held, that the plaintiff could not consider *B. and W.* as defendant's agents, so as to entitle him to maintain money had and received against the defendant for the balance remaining in the hands of *B. and W.*

ASSUMPSIT. The declaration contained several special counts upon the contract between the parties; and also a count for money had and received. At the trial at the last *Westminster* sittings before *Abbott C. J.*, it appeared that the plaintiff had sent out goods to be sold by the defendant, at *Calcutta*, with directions to remit the proceeds either in specie, or in a return-cargo, the nature of which, and the prices to be given for the articles were particularly pointed out by a letter of instructions. The return-cargo which was sent, did not correspond with these instructions, but the plaintiff did not repudiate it within a reasonable time. That question was left to the jury. It appeared, however, that the return-cargo had been consigned to Messrs. *Blanchard and Wilson*, who were desired to sell and to hold the proceeds to the order of *Mackintosh*, the latter having a lien upon the cargo to the amount of about 4000*l.* *Blanchard and Wilson* accordingly sold the cargo, and paid thereout the money due to the defendant. The residue, amounting to 415*l.* remained in their hands, and was admitted to be due to the plaintiff. A verdict having been found for the defendant generally,

The Solicitor-General now moved to enter a verdict for the plaintiff, for the sum of 415*l.*, upon the count for money had and received; and he contended that the cargo having been consigned to *Blanchard and Wilson*, to be held by them at the orders of the defendant, they must

must be considered as his agents, and then the money in their hands was, in point of law, money had and received by *Mackintosh*, to the use of the plaintiff.

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Per Curiam. It does not appear from the circumstances in this case, that *Blanchard* and *Wilson* are so far identified with the defendant, as that the money in their hands can be considered as money had and received by the defendant. They are, in fact, the agents of both parties; of the defendant, for the purpose of protecting his lien upon the cargo, and of the plaintiff for the purpose of paying over the remainder of the proceeds after the defendant's lien has been satisfied. There is therefore no ground for entering a verdict for the plaintiff for 415*l.*, his remedy for that being against *Blanchard* and *Wilson*.

Rule refused.

SAUNDERS *against* WAKEFIELD.

Tuesday,
June 26th.

DECLARATION stated, that a certain action had been commenced by the plaintiff against one *William Pitman*, in the Court of King's Bench, for the recovery of 15*l.*, the amount of a bill of exchange, drawn by the said *W. Pitman*, upon one *Thomas Michmen*, payable to the order of the plaintiff, and then due and unpaid; which action, at the time of the making of the promise of the defendant thereafter mentioned, was depending in the said court, whereof the defendant had notice; and thereupon, in consideration of the premises,

By the 4th section of statute of frauds, an agreement to pay the debt of another must, in order to give a cause of action, be in writing, and must contain the consideration for the promise as well as the promise itself, and parol evidence of the consideration is inadmissible.

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and that plaintiff, at the request of the defendant, *would* cease to prosecute the said action against the said *W. Pitman*, and would stay all further proceedings therein, defendant undertook to pay the plaintiff the amount of the bill of exchange. Averment, that plaintiff did cease to prosecute the said action, and had from thence ceased all further proceedings therein against the said *W. Pitman*, whereof the defendant had notice. Breach, that the defendant, although often requested, had not paid the bill of exchange. Plea, that the said promise, in the declaration mentioned, was a special promise for the debt of another person, to wit, the said *W. Pitman*, and that no agreement, in respect of or relating to the said supposed cause of action in the declaration mentioned, or any memorandum or note thereof, wherein the consideration for the said special promise was stated or shewn, was in writing, or was signed by the defendant, or by any other person by him thereunto lawfully authorised. Replication, that an agreement in respect of and relating to the said cause of action in the declaration mentioned, and whereby the defendant engaged to pay the said bill of exchange, drawn by the said *W. Pitman*, in favour of the plaintiff as aforesaid, was in writing, and was signed by the said defendant, and was in the words following, that is to say, “ Mr. *Wakefield* will engage to pay the bill drawn by *Pitman*, in favour of *Stephen Saunders*.” To this there was a general demurrer and joinder.

Manning, in support of the demurrer. The question raised upon these pleadings, depends, in a great measure, on the case of *Wain v. Warlters*. (a) But it is said, that

(a) 5 East, 10.

doubts

doubts have been entertained as to the authority of that case; and all the objections to it are collected together in *Phillipps v. Bateman*. (a) The first case there referred to, as over-ruling it, is *Ex parte Minst* (b), where, undoubtedly, the expressions used by the Lord Chancellor are strong. But in that case there was a consideration implied from the words of the instrument, viz. the lending of money in future, by *Gurney and Co.* So, in *Ex parte Gardom* (c) also, a consideration, viz. the furnishing twist to *Tapp*, is to be implied. *Stadt v. Lill*. (d) In *Fowle v. Freeman* (e) and *Cotton v. Lee* (f), the whole contract appeared on the face of the written instrument; and in *Egerton v. Mathews* (g), the consideration also appeared in the written agreement. Now these are all the cases cited, as impeaching the authority of *Wain v. Warlters*, and it is clear, that in all of them there was a consideration for the promise stated in writing, as well as the promise itself. Those decisions cannot, therefore, be considered as over-ruling it. In *Gaunt v. Hill* (h), Lord *Ellenborough*, at a subsequent period, considered its authority as valid. The real question is, whether the word agreement, in the 29 *Car. 2. c. 3. s. 4.*, means only the promise of the party sought to be charged, or the whole contract on which he is liable. Now agreement cannot be considered as synonymous with promise. That appears from the interpretations given to it in *Johnson's Dictionary*, in none of which is the word "promise" found. And in *Sheppard's Touchstone*, 85., the consideration is ex-

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(a) 16 *East*, 370.(c) 15 *Ves.* 286.(e) 9 *Ves.* 351.(g) 6 *East*, 307.(b) 14 *Ves.* 190.(d) 9 *East*, 348.(f) 2 *Bro. Ch. Rep.* 564.(h) 1 *Starkie*, 10.

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pressly mentioned, as an essential part of an agreement as well as the promise. It would let in all the inconvenience intended to be prevented by the statute, if the consideration, which must be proved, could be lawfully proved by parol testimony, and was not required to be in writing. Besides, the replication states an absolute promise to pay at all events, whereas the promise in the declaration is only conditional. It is therefore a departure.

Abraham contra. This is not a departure, for it would be no variance at nisi prius, if the promise stated in the replication were given in evidence, as proof of the promise in the declaration, *Peacock v. Monk (a)*, *Rex v. Scammonden (b)*. But admitting that the replication is a departure, and therefore bad, the plea in this case is insufficient; for it only states, that no agreement wherein the consideration for the promise was stated, was in writing, or was signed by the defendant. The plea, therefore, raises the question, whether the case of *Wain v. Warlters* was rightly decided. Now in *Ex parte Minet*, the Lord Chancellor expressly says, that that case is contradicted by a variety of authorities; and adds, that the undertaking of one man for the debt of another does not require a consideration moving between them. And the other cases which have been mentioned on the other side, are to the same purport, *Morris v. Stacey, (c)*, *Lyon v. Lamb. (d)* In *Reniger v. Fogossa (e)*, several species of agreements are defined, but in none of them is a consideration mentioned, as an essential or necessary

(a) 1 Ves. sen. 127.

(b) 3 T. R. 474.

(c) 1 Holt. N. P. C. 153.

(d) Fell, Law Merc. of Guar. 259.

(e) Plowden. Rep. 1.

part,

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part, without which an agreement cannot subsist. In truth, an agreement is the assent of two minds to do a particular act; and in the statute of frauds, the word is used in its popular sense, and so it seems to have been considered by *Abbott C. J.* in *Goodman v. Chase* (a), where he puts the case of a promissory note in these words: "I hereby agree to pay the bearer 20*l*." There it is synonymous with the word promise. The word agreement, in the latter part of the 4th clause, is merely a word of reference to the former part; and the words to which it refers are "special promise." Here there is a promise in writing. In *Goodman v. Chase* also, the Court entertained so much doubt as to the authority of *Wain v. Warlters*, that they ordered a second argument. That case, however, was finally decided on another point. The plea therefore is bad, and then the plaintiff, notwithstanding any defect in his replication, will be entitled to judgment.

ABBOTT C. J. I am of opinion, in this case, that the plea is good, and that the replication is bad; I assent to the argument which has been pressed upon us, that the word agreement, in the latter part of the 4th section of the statute of frauds, is to be construed to be a word of reference, and that it refers to words contained in the former part of the section. Now in the former part of the section, we find the words, special promise, agreement, contract, or sale. I read, therefore, the latter part of the clause, as if all those precedent words were incorporated in it, together with the word agreement, and then it would stand thus, "unless the agreement,

(a) 1 B. & A. 500.

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special promise, contract, or sale, upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed," &c. It is then to be considered, with reference to the common law, whether there can be an agreement, special promise, contract, or sale, which would be valid in law, unless a consideration appeared for it. Now, at common law, a promise to pay the debt of another, if made simply, and without a good consideration for it, would be void. So also a promise by an executor, to answer damages out of his own estate, would be void, if made without consideration. It is impossible to suppose, that the statute of frauds, which was intended to correct the common law, can apply to cases in which, at common law, when the promise was not in writing, there was previously no remedy. Now, at common law, no action would lie, unless there was some specialty or peculiarity in the promise. It is impossible to conceive how there can be such specialty unless the consideration for the promise be stated. For it is the consideration which makes it a special promise. The consideration, therefore, must have been in the contemplation of the legislature, when they used the words special promise. If so, it will follow, that a party is not entitled to recover, unless the written agreement contain some specialty, which cannot be unless it contain the consideration for the promise. There must therefore be judgment for the defendant.

BAYLEY J. I am of the same opinion. The object of this statute, which was a most useful act, was to prevent frauds and perjury, and it ought to be construed so as most effectually to accomplish that object. The fourth section contains several cases in which it is provided,

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vided, that no action shall be brought. One case is of a special promise by an executor, to answer damages out of his own estate; another of a special promise, to answer for the debt, default, or miscarriage of another person. Now, at common law, in order to make a person chargeable in such cases, there must be a special consideration for the promise, either moving to the party promising, or from the party in whose favour the promise is made. Then the statute provides, that a party shall not maintain an action in such cases, unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and I think, therefore, that that memorandum must include a statement of the consideration for such agreement. A contrary decision would be most mischievous. For if we were to hold, that the consideration might be omitted in the written agreement, we should immediately let in fraud and perjury. The consideration may be either past or future; and if the written agreement contain only a promise to pay, the party who relies upon it may then introduce parol evidence of a consideration, which perhaps was never intended by the parties, and so a door would be open to fraud and perjury. Suppose the real consideration for the special promise is something in future to be done. If that be not reduced into writing, the plaintiff may state in his declaration a past consideration, and bring parol evidence to prove that fact. I find too, that the word "agreement" in this clause is coupled with "contracts of marriage, and for the sale of land;" now in those cases, it is clear that the consideration must be stated. For it would be a very insufficient agreement to say, "I agree to sell *A. B.* my lands" without

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without specifying the terms or the price; and if those could be supplied by parol evidence, we should let in all the mischief, against which the statute meant to guard, viz. of having important parts of the contract proved by parol evidence. Without therefore going beyond the words of the clause applicable to this particular case, I think that they import, that there must be some specialty in the transaction, and that they mean, that the special promise should be in writing, incorporating in it its consideration, which alone makes it binding. This seems to me to be the result without any reference to authorities on the subject. But in addition to this, we have the unanimous opinion of this Court in the case of *Wain v. Warlters*, a case which was well considered at the time by four most able judges. Upon principle and authority, therefore, I think that we ought to decide in favour of the defendant.

HOLBOYD. J. I am of the same opinion. Whether we consider the general object of the statute, or the particular object of the fourth clause, it seems to me to be necessary, that the consideration for the promise should be stated in writing. The consideration is the very ground of the action, and without it the action will not lie. In the present case, that which is reduced into writing, affords of itself no ground of action. The general object of the statute was, to take away the temptation to commit fraud by perjury in important matters, by making it requisite in such cases for the parties to commit the circumstances to writing. The particular object of the fourth clause was, to prevent any action being brought in certain cases, unless there was a memorandum in writing. The object of both
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was, that the ground and foundation of the action should be in writing, and should not depend on parol testimony. Unless, therefore, what is sufficient to maintain the action be in writing, no action can be supported. If we take the word "agreement" used in the fourth section in its strict sense, it would seem to imply, that the whole of that which is agreed between the parties should be in writing, and the other cases mentioned in the clause support such a construction. For upon an agreement upon consideration of marriage, or a contract for the sale of lands, it is quite clear, that the consideration must be stated in writing. But whether we construe the word in this strict sense or not, still, in as much as without a consideration there can be no ground of action, it seems to me, that, upon this clause, the consideration must be stated in writing. In the present case, that which is reduced into writing is merely an engagement to pay the bill. Now, unless there be a consideration for that, no action lies upon such a promise. If a consideration is to be introduced, it may be either past or future, and must be proved by parol evidence. If that were allowed, all the danger which the statute of frauds was intended to prevent, would be again introduced. I am therefore of opinion, that there must be judgment for the defendant.

BEST J. I am of opinion that the plea is good, and that the replication is a departure from the declaration. The contract stated in the declaration is, that, in consideration that the plaintiff would forbear to prosecute an action against *Pitman* on a bill of exchange, defendant promised to pay the bill, to which the defendant having pleaded that such promise was not in writing,
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the replication sets out the agreement itself, which is an absolute promise to pay the bill at all events, omitting altogether any mention of the consideration, which was the forbearance to sue. Now if the cause had gone down to trial on the general issue, and the written promise set out in the replication had been produced, it would have been a variance from the contract stated in the declaration. If so, it is a departure in pleading. It has, however, been contended, that the plaintiff may introduce the consideration by parol evidence; but the rule is, that a party cannot by parol evidence shew that the contract is different from that reduced into writing, and here the introduction of the consideration by parol evidence would do that. For no two things can be more unlike than an absolute and conditional promise. I am of opinion, therefore, that no such parol evidence could have been received, and if so, the replication is bad. Then the question is, whether the plea is good, and I think that it is so, independently of the authority of *Wain v. Warlters*. For it appears to me impossible to satisfy the words of the statute of frauds, unless the consideration be in writing. And whether we consider the words "agreement" and "promise," as having the same meaning, seems to me immaterial to the present decision. For the promise here is not fully and fairly stated in writing, unless it can be considered as fully and fairly stated where a promise, in reality conditional, is stated to be absolute. Again, if we take it upon the word "agreement," it must mean the whole agreement, and here the whole agreement is not in writing. Independently therefore of the authority of *Wain v. Warlters*, I am satisfied that this case falls within the fourth section of the statute of frauds.

frauds. The object of the statute cannot be attained unless the whole transaction be reduced to writing. For there would be the same danger of perjury in proving, by parol evidence, the consideration as the promise. I am therefore of opinion, that the plea is good, and that our judgment should be for the defendant.

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Judgment for the defendant.

LEWIS *against* WALTER.

Tuesday,
June 26th.

DECLARATION by plaintiff, for a libel upon him in his character of an attorney. It stated, that at the *Hants* quarter sessions a bill of indictment was found against the plaintiff and two other persons, for a conspiracy to defraud the under-sheriff of *Hants*, upon which indictment the plaintiff was found not guilty; yet that the defendant, well knowing the premises, and wishing to cause it to be believed that the plaintiff had been guilty of the offence charged in the indictment, published in the *Times* newspaper the libel in question, which purported to be an account of what took place at

Declaration for a libel published in a newspaper. Plea, that the libel was originally published in the *H. Journal* by *I. S.*; and that at the time of publication by the defendant, it was stated in such publication that it was copied from that newspaper; and that, pursuant to stat. 38 G. 3. c. 78., *I. S.* had made

an affidavit that he was the publisher of the *H. Journal*, and still remained so at the time of publication of the libel: Held, that this plea was bad, inasmuch as the publication by the defendant did not specify by name *I. S.* as the original publisher of the libel, but only named the journal. Semble, that even if *I. S.* had been named by the defendant when the latter published the libel, such publication, being of written slander, could not have been justified. Semble, also, that the repetition of oral slander, accompanied by a declaration of the name of the original author, cannot be justified, unless such repetition be made without malice, and upon a fair and justifiable occasion.

The libel stated in the declaration purported to be a speech of counsel at a trial of the plaintiff on a criminal charge; and it stated, after setting out the speech, that a witness was called, who proved all that had been stated by counsel, and that the defendant was immediately after that acquitted, upon a defect in proving some matter of form. The plea stated, that in fact such a speech was made, and that the witness called proved all that had been so stated; but it did not set out the evidence, or justify the truth of the charges made in the counsel's speech: Held, that such plea was bad, inasmuch as a party could not be justified in publishing the result of evidence given in a court of justice, but must state the evidence itself.

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the trial. It set out the speech of the counsel for the prosecution, which, in part, contained the supposed libel on the plaintiff, and then continued, "The first witness called was *R. P.*, who proved all that had been stated by the counsel for the prosecution. Mr. *J. G.*, the attesting witness to the bill of sale from the sheriff to Messrs. *W.*, was next called, but not being able to prove a deputation from the under-sheriff for that year, the jury, under the directions of the learned Judge, were obliged to give a verdict of acquittal, to the great regret of a crowded court, on whom the statement and the evidence, as far as it went, made a strong impression of their guilt." Plea, 1st, not guilty; 2d, that after the expiration of forty days from the 28th June, 1798, and before the publishing of the said supposed libels by the defendant, on the 11th April, 1819, the supposed libellous matter set forth in the declaration was published in a certain public newspaper, intitled, "*Hampshire Telegraph and Sussex Chronicle*," by George Henry Motley and William Harrison. Plea then stated, that defendant, at the several times when he published the said supposed libels, did also publish that the supposed libellous matter was copied and quoted from the last-mentioned public newspaper; and that, at the time of the said supposed libellous matter being so published in the last-mentioned public newspaper, an affidavit, before then made and delivered to the commissioners for managing his majesty's stamp duties, was remaining at the office of the commissioners, pursuant to the statute, by which affidavit the said *G. H. M.* and *W. H.* made oath that they, the said *G. H. M.* and *W. H.*, were, at the time of making the affidavit, the publishers of the last-mentioned public newspaper. The plea then stated, that

that the said *G. H. M.* and *W. H.*, at the time of the publication of the supposed libellous matter by the said *G. H. M.* and *W. H.*, had not, nor had either of them, signed or sworn any affidavit that they had ceased to be the publishers of the last-mentioned public newspaper. Wherefore the defendant published the said supposed libellous matter as he lawfully might. The 3d and 4th pleas did not differ materially from the first. The 5th plea, as to all except the matter following, viz. "to the great regret of a crowded court, on whom the statement of the evidence, as far as it went, had made a strong impression of their guilt," stated that, at the trial of the indictment, the counsel for the prosecution made the speech set out in the supposed libel, and that having so stated the facts, the said *R. P.* was called and appeared as the first witness in support of the said charges, and by his testimony proved all that had been so stated by the counsel for the prosecution, and that *J. G.*, the attesting witness to the bill of sale of the said Messrs. *W.*, was next called as a witness in support of the prosecution, and that not being able to prove the deputation of the under-sheriff to the officer, the jury, being so directed by the Judge, were obliged to give a verdict of acquittal. The plaintiff joined issue on the plea of not guilty, and demurred generally to the other pleas.

Chitty, in support of the demurrer. The first three special pleas are bad, inasmuch as they do not state that the persons from whose paper the libel was copied were the original authors. If an action were brought against them, therefore, they might plead that, at the time of the publication by them, they also stated that

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they copied it from another paper. It is true that in some instances a person repeating slander which he has heard from another will be justified, if at the time of the repetition he declares the name of the person from whom he heard it. That rule, however, has never been extended to the case of written slander, by which greater publicity is given, and which is a more deliberate act. Besides, the defendant, at the time of the publication, did not give the names of the publishers, but merely a clue by which those publishers might be discovered. *Davis v. Lewis* (a), and *Woolnoth v. Meadows* (b), are authorities to shew, that even in the case of oral slander the name of the original author of the slander must be mentioned at the time of repeating it. The fifth plea is bad, inasmuch as it only states the speech to have been made by a counsel, and then alleges generally, that a witness called in support of the charges proved all that had been stated by the counsel. Now if it be allowable to publish the proceedings of a court of justice, the evidence itself ought to be given, and not the result; for the plaintiff cannot take issue upon the fact, whether the witness proved all that the counsel said. *Maitland v. Gouldney* (c) is an authority to shew that, in a justification that the defendant named the original author of the slander at the time, it is necessary to give the very words used, and not the effect of them. Besides, this was the publication of an ex parte proceeding, the defendant not having had an opportunity of proving his innocence; and *Rex v. Lee* (d), and *Rex v. Fisher* (e), are authorities to shew that such a publication is not lawful.

(a) 7 T. R. 17.

(b) 5 East, 463.

(c) 2 East, 426.

(d) 5 Esp. 123.

(e) 2 Campb. 563.

Platt, contra. The first three special pleas are good. By the 38 Geo. 3. c. 78., no person shall publish a newspaper, until an affidavit shall be delivered to the commissioners of stamps, specifying the name and place of abode of the printer, publisher, and proprietor; and by s. 12., the copy of such affidavit shall, in all proceedings civil and criminal, touching any publication contained in such newspaper, be conclusive evidence of the truth of all such matters set forth in the affidavit against every person who shall have signed and sworn such affidavit, and also against every person who shall not have signed the same, but who shall be therein mentioned to be a proprietor, printer, or publisher of such newspaper. The fact disclosed in these pleas, that, at the time of publishing the libel, the defendant named the newspaper from which it was copied, and that, before that time, an affidavit was duly filed with the commissioners of stamps, by which the persons named in the plea made oath, that they were the publishers of the same, shews, that the defendant gave the plaintiff the means of ascertaining, with certainty, the original authors of the slander, and therefore, that he furnished the plaintiff with a certain cause of action against a prior propagator of the slander. For the maxim "*certum est quod certum reddi potest*" applies. In order to maintain an action for the publication of a libel, the libellous matter must be false and malicious; thus if a man truly charge another with an offence, though he may be indictable for it, still he may justify the truth in an action, however maliciously he may have made the charge. (a) So, in an action for a malicious prose-

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(a) *Maitland v. Gouldney*, 2 East, 426.

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ention or arrest, there must be a want of probable cause, however strong the evidence of malice may be. Although slanderous matter reduced to writing will be actionable, where the same matter not in writing would not be so, yet, with respect to the ingredients of falsehood and malignity, the rules which obtain in an action for the publication of the one are equally applicable to one brought for the publication of the other. The deliberation with which an alleged calumny may be published, cannot alter the question with respect to its truth or falsehood. In this case, the defendant has not transgressed the bounds of truth, for he has only alleged by the supposed libel, that the libellous matter had been published by the proprietors of the *Hampshire Telegraph*, which was in fact the case; not vouching himself for its authenticity, but citing his authority; so that his publication of it could not give any confirmation or authenticity to the slander, which still stood upon the authority of the original propagator of it. Now it is a general rule, that if *A.* publish to *B.* slanderous words, and he reports them as he heard them from *A.*, *A.* shall be answerable for all the damage which the individual so calumniated may sustain, by reason of *B.*'s having so reported it. Earl of *Northampton's* case, (a). Upon principle, the same rule will apply to libels. If *A.* publish libellous matter, and *B.* report it afterwards as having been published by *A.*, the latter shall be answerable to the person libelled, for all the damage he may sustain by reason of *B.*'s having so reported it; for if *B.* were also answerable, the plaintiff would recover his damages twice over; and the law will not allow two compensations for the same injury. The fifth plea is good, although it only states the result of the

(a) 12 Rep. 134.

evidence given by the witness. The reason why it is necessary in ordinary cases to set out the very words of the slander, is, to give to the party slandered a certain cause of action against the original author of the slander. But in this case that reason does not apply, because no action could be maintained, either against the counsel who, in the course of his professional duty, stated the facts of the case, or against the witness, who, in the course of a judicial proceeding, gave his evidence. That plea, therefore, is good.

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ABBOTT C. J. In giving my opinion upon the present case, I shall not refer to the formal objections (a), because if the pleas were good in point of substance, the Court would, no doubt, permit those pleas to be amended; nor do I think it necessary to decide, whether a plea in bar, stating that the defendant copied the libel from another newspaper, and that he at the time named the publishers of that paper, would be good; for, in the present case, although the defendant has now in his plea given those names, he did not do so when he published the libel. I am not prepared, however, to assent to the proposition, that such a defence is applicable to cases of written slander, for that would give great facility to such publications, which ought, if possible, to be prevented. Nor am I prepared to say that this is matter of defence upon a plea in bar; for it cannot be an answer to the charge of malice, which may exist in the case of repetition as well as invention; and if we held it to be a bar, that question would be altogether

(a) In the course of the argument, some formal objections were taken to the pleas, which, as the Court did not ultimately decide upon them, have not been mentioned.

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withdrawn from the consideration of the jury. But if, instead of pleading it, it be given in evidence under the general issue, then the question, whether it were repeated maliciously, and from a design to slander or not, would be left to the jury, who might then find their verdict upon the whole case. As to the last point, the objection taken to the fifth plea, seems to me unanswerable. It is asserted in the libel, that a certain witness proved the allegations contained in a speech made by counsel in stating a case to the jury. Now that justification cannot be supported. The defendant ought to have detailed and transcribed in the publication, the evidence of the witness. If he had done so, his readers might then have judged for themselves. If a party is to be allowed to publish what passes in a court of justice, he must publish the whole case, and not merely state the conclusion which he himself draws from the evidence. I think, therefore, that these pleas are bad.

BAYLEY J. I am of the same opinion. I think that these pleas are bad in substance. As to the first three special pleas, it does not appear that the defendant, at the time of publishing the libel, stated the name of the original author of the slander. It has been argued, however, that he did state sufficient to enable the plaintiff to find that out. But I am of opinion, that that is not sufficient. An individual slandered is not to be put to the expence and trouble of ascertaining, by enquiry, who the original libeller is. If a defendant is to be allowed to rely upon a plea of this nature (supposing that there can be such a plea in law, which may be doubtful) it can only be in a case where he has originally given up the author by name, and where the

name

name is sufficient to identify the party. If that be not sufficient for that purpose, I think there ought to be an additional description. I am also of opinion, that the last plea is bad. It is no justification that a defendant has truly stated, in his publication, the speech made by counsel, in stating a case to the jury; he must go further, and shew the truth of the facts there stated. It is the duty of a counsel to state facts, although they may be injurious to the character of individuals, and he is privileged so to do, if he speaks conscientiously according to his instructions; but if it were to follow, that others might repeat what he says, it might be most injurious to the character of individuals; for as to them, the reason for the privilege, which is the advancement of public justice, does not apply. This principle is recognised in *Lake v. King* (a), *Rex v. Lord Abingdon* (b), and *Rex v. Creevey* (c). Upon these grounds, I am of opinion, that this plea cannot be supported, and that our judgment must be for the plaintiff.

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 LEXIS
 against
 WALTON.

HOLROYD J. I am also of opinion that these pleas are bad, and that even if they had been pleaded in a more formal manner, they could not have been supported. In actions for slander, the truth may be pleaded as a legal defence. But that plea admits the malice, and, notwithstanding that, justifies the publication. It is, however, a very different thing to justify the repetition of slander, by alleging, as a bar, that some other person originally was the author of it. For it does not follow, that, because a defendant may justify slander if true, he may also justify the repetition of

(a) 1 *Saynd.* 131.(b) 1 *Esp.* 226.(c) 1 *M. & S.* 273.

sland-

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slandorous words which are not true, if he has heard them from another person. Unless we go the length of holding, that such a repetition would be justifiable, even when spoken from a bad motive, we cannot support the present pleas. All the cases on this subject arise out of the case of the *Earl of Northampton*, (a). They do not, however, confirm that decision, but all go on the ground of being distinguishable from it. The book in which that case is found, is not so accurate as the rest of the reports of Lord Coke, not having been published by him in his lifetime, but from his notes afterwards. The point there is stated in very general terms, and as it seems to me, may be questionable. It is put thus: "In a private action for slander of a common person, if *J. S.* publish that he hath heard *J. W.* say that *J. G.* was a traitor or thief, in an action on the case, if the truth be such, he may justify." It is observable, that Lord Coke does not say that it is lawful to repeat slander in all cases and at all times, but only that the party may justify under certain circumstances. If, for instance, he repeats, not with intention to defame, that may be so; but it is not laid down, that a defendant may maliciously do so; and unless it goes that length, it will not support the present pleas. But I think it is questionable, whether, as stated, it must not have some qualification added; for in the third resolution, cases are put in which it is held to be unlawful to repeat slander. Taking, therefore, the whole together, it seems to me, that the proper way is, to take the passage, with this qualification, that if *J. S.* publish, on a fair and justifiable occasion, that he hath heard *J. W.* say that *J. G.* was a traitor or thief, he may, if the truth be such, justify. It must not, therefore, be taken

(a) 12 Rep. 153.

as a general rule, even in oral slander, that the malicious repetition of it may be justified, if the name of the author be given up at the time. If it could, it would be productive of mischief; for the person slandered could bring no action against the malicious repeater, and if he did discover who the person was, and brought an action against him, he might only be able to support it by the testimony of the very person who had so maliciously repeated it. Perhaps, therefore, the rule has been laid down too largely in the Earl of *Northampton's* case, and ought to be qualified, by confining it to cases where there is a fair and just reason for the repetition of the slander. In the present case, however, it is clear, that there must be judgment for the plaintiff. On the other point, I concur with the rest of the Court.

BEST J. I am of the same opinion. The attempt here is to justify this libel under the authority of the Earl of *Northampton's* case. If this precise point had been there determined, I should doubt the propriety of that decision; and I think that the reasons given by my Brother *Holroyd* shew that the fourth resolution in that case requires some qualification. For it cannot be justifiable to repeat slander under all circumstances; but only in those cases where it is done, not for the purpose of merely circulating the slander, but for some fair and reasonable cause. And, besides, I am not prepared to say that that case extends to written slander, in which the repetition, by producing a greater dispersion, increases in a tenfold degree the injury to the individual. I think, therefore, that the first three special pleas are bad. As to the last plea, I also agree with the rest of the Court. Here the proceeding which was
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published was not complete, the case having been stopped in limine. And the words of the witness are not stated, but the substance of his evidence. This, therefore, cannot be justified. Besides, the defendant must have known, when he copied it from the other paper, that it was an illegal publication; and he cannot be justified in republishing a statement which he knew to be unlawful.

Judgment for the Plaintiff

Wednesday,
June 27th.

The KING against GLOSSOP.

In a conviction of defendant for causing to be acted at a certain place called the *Coburg Theatre*, in the parish of *St. Mary, Lambeth*, for gain and reward, a certain entertainment of the stage called *Richard the Third*, the evidence set forth was, that the defendant was seen once or twice at the rehearsals of *Richard*; that

another person was stage-manager; that defendant engaged *I. S.* to perform, and gave him a check for the amount of his benefit: Held, that this was sufficient to warrant the justices in drawing the conclusion that the defendant caused the play of *Richard the Third* to be performed.

The conviction also stated, after the appearance and plea of defendant, that divers credible witnesses, to wit, *I. S.*, &c., came before the justices upon their several oaths, to them severally and respectively, and in the presence of the said *I. S.* &c. duly administered: Held, that taking it altogether, it did substantially appear that the oath was administered to the witnesses in the presence of the magistrates.

The evidence also stated, that the *Coburg Theatre* was in the parish of *Lambeth*, and the adjudication of the penalty was to the poor of the parish of *St. Mary, Lambeth*: Held, that this was no variance, it not appearing that there were two distinct parishes so named.

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the appearance of defendant, and plea of not guilty; and then proceeded thus, "nevertheless, upon this same day and year last aforesaid, at the said police-office, *Union-Hall*, in the said parish of *St. Saviour* aforesaid, divers credible witnesses, to wit, one' *John Toovey*, one *Junius Brutus Booth*, and one *William Allway*, came before us the said justices, upon their several oaths, on the Holy Gospel of God, to them severally and respectively, now here and in the presence of the said *John Toovey*, *Junius Brutus Booth*, and *William Allway*, respectively duly administered: depose, swear, and in the presence of the said *Joseph Glossop*, upon their oaths aforesaid, severally affirm and say," &c. In the evidence it was stated, that the *Coburg* theatre was in the parish of *Lambeth*; and that an alteration of the play of *Richard the 3d.* was acted there for money. As to the defendant's causing that play to be represented, the evidence stated was, that *I. B. B.* became acquainted with defendant as manager and proprietor of the *Coburg* theatre; that defendant was seen once or twice at the rehearsals of *Richard*; that another person was stage-manager; that *I. B. B.* engaged with defendant to perform several characters; that *I. B. B.* applied to defendant for that purpose; and that defendant made him an offer for twelve nights, to perform; that the contract was in writing; that *I. B. B.* afterwards performed there. That at his benefit defendant gave him a cheque for the amount. The conviction concluded, that defendant was guilty, and adjudged the penalty of 50*l.*, one-half to the informer, and one-half to the poor of the parish of *St. Mary Lambeth*, being the parish where the offence was committed. The conviction having been removed into this Court by certiorari.

Marryat,

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Marryat, Casberd, and Adolphus, took three objections to it. First, that it did not sufficiently appear that the defendant had caused the play of *Richard* the 3d. to be performed. All that appears is, that he was seen at one or two rehearsals of *Richard*, and that he offered to engage performers, and paid them. But these facts do not shew even *prima facie* that he caused that particular play to be performed, which is necessary. Secondly, the witnesses do not appear to have been sworn in the presence of the magistrates, or of the defendant. They are stated to have been sworn in the presence of themselves only. If so, the evidence was improperly taken. Thirdly, the adjudication of the penalty is to the poor of *St. Mary Lambeth*, whereas the evidence states the *Coburg* theatre to be in *Lambeth* only, and now constat that *Lambeth* and *St. Mary Lambeth* are the same parish.

Scarlet, Gurney, F. Pollock, and Turton, contra were stopped by the Court.

ABBOTT C. J. As to the first objection, it is sufficient to say, that it cannot prevail, unless the evidence stated on the face of the conviction, be such as that no reasonable person could draw the conclusion, that the defendant caused this particular play to be performed. I am very far from thinking that to be the case. The magistrates might very reasonably draw the conclusion, and having done so, we cannot overturn their decision as to the fact. As to the second objection, the whole forms one sentence; and it is there stated, that the defendant having appeared before the magistrates and pleaded not guilty, "nevertheless, upon this same day and year, divers

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credible witnesses, to wit, &c. come before us upon their several oaths, on the Holy Gospel of God, now here in the presence of the said witnesses duly administered; &c." Taking the whole together, I think it substantially appears that the oath was administered in the presence of the magistrates to the witnesses. As to the last objection, I think the evidence sufficient to support the adjudication. It does not appear that *Lambeth*, and *St. Mary, Lambeth*, are two parishes, and unless that be so it is no variance. If in the trial of an ejectment, the premises were described to be in *St. Mary, Lambeth*, and the evidence stated them to be in *Lambeth*, I think it would be no variance. And it was so held in *Doe dem. Tollet v. Salter (a)*, where the ejectment was for lands in *Farnham*, which, at the trial, were proved in *Farnham Royal*: and there it was held no variance, the defendant not having proved that there were two *Farnhams*. I do not think therefore, that the magistrates were wrong in the adjudication made by them, on this evidence. Upon the whole, therefore, none of these objections are sufficient, and the conviction being regular, must be affirmed.

Conviction affirmed.

(a) 13 *East*, 9.

The KING *against* The Inhabitants of HOLY CROSS, WESTGATE.

Wednesday,
June 27th.

TWO justices by their order removed the pauper, *Edward Best*, from the parish of *Holy Cross, Westgate*, in the city of *Canterbury*, to the parish of *Holy*

Where a pauper was legally sworn in as a borsholder at a court leet, and after executing

the office for a few days, he was afterwards irregularly, by two magistrates, discharged from executing his office, and another person appointed; but he acquiesced in this, and did not in fact afterwards execute the office; Held, that this was not executing an annual office within the parish so as to confer a settlement.

Cross,

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The King
against
The Inhabit-
ants of
HOLY CROSS,
WESTGATE.

Cross, Westgate, in the county of *Kent*. The sessions on appeal confirmed the order subject to the opinion of this Court upon the following case. The city of *Canterbury* is divided into six wards, and two of the twelve aldermen of the city are appointed for each ward, a court leet is held annually by the two aldermen, at which a constable and borsholder for the ward are chosen. In the month of *October*, 1817, and for some time previously, the pauper resided and carried on business in the parish of *St Mary Northgate Canterbury*, which is in the ward of *Northgate*, that ward containing the parishes of *St. Mary Northgate*, and *St. Alphage*. On the 21st *October*, 1817, the annual court leet was held for the ward of *Northgate*, at which the pauper was duly chosen borsholder of the ward for the year ensuing, and upon being sent for to take upon himself the office, he attended at the court, and was regularly sworn in, the staff of office was also delivered to him by the former borsholder. A day or two afterwards he happened to be at the *City Arms* public house, within his ward, when a dispute arose between some persons, which was likely to create a disturbance, and he was desired to preserve the peace; in consequence of which, he fetched his staff, and put an end to the dispute, but he did not do any other act as borsholder than that. After he had been sworn in a few days, he was desired to attend the monthly meeting of the magistrates, and he attended with his staff; he was called into the council chamber, and informed by the then mayor, that as it was a question to what parish he belonged, he must leave his staff there for the present, and that he should know further about it in a few weeks, he left his staff accordingly, and not having heard any thing more, he did not act,

nor

nor was he called upon afterwards to act as borsholder. The steward of the leet notified the pauper to the magistrates, as the sworn borsholder for the ward of *Northgate*, and he appeared so in the list of the peace officers, entered in their record book. The succeeding court leet for the ward of *Northgate* was holden on the 20th *October*, 1818, and the pauper resided during the whole of the year in the parish of *St. Mary, Northgate*. The duties that were required to be performed by the borsholder of the ward of *Northgate*, during the remainder of the year, were performed by another person, who resided part of that time within the ward, and part in the borough of *Staplegate*, adjoining to the ward, but not within the jurisdiction of the city of *Canterbury*, but that other person was not chosen or sworn in as borsholder of the ward, nor did he attend the sessions in that character, nor was his name enrolled in the list of peace-officers.

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 against
 The Inhabit-
 ants of
 Holy Cross,
 Westgate.

Berens, in support of the order of sessions, after stating the case, and that the question was, whether the pauper gained a settlement under 3 & 4 *W. and M. c. 6.*, by executing a public office in the parish during a year, was stopped by the Court.

Bolland contra. In this case the pauper was the legal borsholder during the whole year; for the mayor had no right to remove him from the office over which he had no jurisdiction; nor can he be considered as having executed the office by deputy. For all the cases of deputies are where they are appointed by the courts leet, which was not done here. The pauper therefore was the legal officer, and resided in the parish for a

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ants of
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year, and there is nothing which shews any refusal on his part to perform the duties of his office. In fact he would have been liable to punishment, if he had so refused.

ABBOTT C. J. At the time of the passing 3 & 4 W. and M. c. 6., it was possible for any individual to gain a settlement by a residence for forty days in the parish. The object of that act was, to add to this the necessity of delivering to the parish officers a notice in writing, which they were required to read in the church and to register, in order that there might be public notice to all the inhabitants, that they might, in case the individual was likely to become chargeable, procure his removal from the parish. But that act contemplated two cases, in which no notice in writing was to be given, viz. the serving an annual office and the payment of parish rates. Its object was obviously notoriety. Now that is only attained by the actual execution of the office, and not by the appointment to it. Although, therefore, it does appear, that the pauper in this case was irregularly discharged from his office, and another person irregularly appointed to succeed him, yet as he did forbear to do the duties of it, I think he cannot within the statute be considered as having executed a public annual office in the parish, and that he did not thereby gain a settlement. The judgment of the sessions was therefore right.

Order of Sessions confirmed.

1821.

The KING *against* The Inhabitants of the West Riding of YORKSHIRE. *Wednesday, June 27th.*

INDICTMENT, in the usual form, against the defendants, for the non-repair of 300 feet of the highway next adjoining the south end of *Leeds* bridge, in the West Riding of the county of *York*. The plea admitted, that, as to 75 feet next adjoining the south end of the said bridge, the inhabitants of the West Riding were liable to repair the same; but stated, as to the residue of the said highway, that the bridge was an ancient bridge, situate from time immemorial within the township of *Leeds*, in the said Riding, and that the said residue of the said highway, from time immemorial, had also been situate in the said township; and from time immemorial had been repaired by the inhabitants of the township of *Leeds*. Demurrer and joinder.

In a plea by the inhabitants of a county, that the inhabitants of a particular township have immemorially repaired the highway at the end of a county bridge situate within the township, it is not necessary to state any consideration for such prescription.

Blackburne, for the crown, in support of the demurrer. The plea is bad in not stating any consideration for the prescriptive liability of the inhabitants of the township of *Leeds* to repair this part of the highway. In *Rex v. St. Giles's, Cambridge* (a), the plea was held bad for this reason. And the ground of the decision in that case, that there could not be any possible consideration for casting the burden of repairing the road on the inhabitants of another parish, equally applies here. For the inhabitants of *Leeds* are equally with the rest of the Riding bound to contribute to the

(a) 5 M. & S. 260.

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 against
 The Inhabit-
 ants of the
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repairs of other bridges. In *Rex v. Ecclesfield* (a), a consideration appeared on the face of the record. For there it was stated as a general custom in the parish for each township to repair its own roads.

E. Alderson, contra, stopped by the Court.

ABBOTT C. J. The uniform course of pleading is to state the prescription, as in the present case. The case of *Rex v. St. Giles's, Cambridge*, is quite distinguishable, on the grounds stated in the judgment of the Court in *Rex v. Ecclesfield*. Here the highway is situate within the township of *Leeds*. The object of the form of the plea in *Rex v. Ecclesfield* probably was to allow greater latitude to the evidence in support of it, and also because possibly the road indicted in that case was not an immemorial highway. Here it is the ordinary case of a township, liable to repair a part of a bridge situate within it, of which there are many instances in the books. There must, therefore, be judgment for the defendants.

Judgment for the defendants. (b)

(a) 1 B. & A. 359.

(b) See 7 East 588. *Rex v. Inhabitants of the West Riding*.

Wednesday,
 June 27th.

The KING against The Inhabitants of TYRLEY.

A pauper having hired himself without specifying any time, entered into the service

the day before *New-year's Day*, and quitted two days after *Christmas*, receiving his full wages: that being the usual time that servants in that part of the country go into and leave their places. The Court thought that this was a contract which had arrived at its termination before the expiration of a year; but the sessions having expressly found it to be a hiring and service for a year, the Court considered themselves as bound by that finding.

county

county of *Stafford*. The sessions, upon appeal, confirmed the order, subject to the opinion of this Court, on the following case. *Edward Peake*, the pauper, hired himself at 8*l.* and his washing, without any time being specified, but which the sessions found to be a general hiring for a year. The pauper entered into his service the day before *New-year's Day*, and quitted, with the consent of his master, two days after *Christmas-day*, the usual time that servants, in that part of the county, go into and leave their places. The pauper received the whole of his wages at the time of his quitting, and stated, that when he left, he considered himself no longer under the controul of his master. The sessions confirmed the order, and found this to be a hiring and service for a year.

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ants of
TYLLEY.

Nolan, in support of the order of sessions, was stopped by the Court.

Pearson, contra. Although the sessions have found it to be a hiring for a year, yet it is clear their decision is wrong, for there is no ground for presuming any dispensation with the service. It is expressly stated that this pauper quitted at the usual time, and came in also at the usual time. There was, in substance, therefore, only a hiring, according to the custom of the country, which it appears is for a less period than a year.

ABBOTT C. J. As the sessions have expressly found the fact of a hiring and service for a year, I think we are bound by it. I cannot say that no reasonable person could come to such a conclusion upon the facts stated, although I certainly should not have come to

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The KING
against
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ants of
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it myself. I should have thought, that, in this case, there was neither a dispensation with the service, nor a dissolution of the contract, but that the contract had arrived at its termination, and that before a year had expired. But still, as the question was properly for the determination of the sessions, who have expressly found the fact otherwise, I think their order must be confirmed.

Order of Sessions confirmed.

Thursday,
June 28th.

The KING *against* The Justices of SALOP.

Semble, that the entering in to the recognizance required by 49 G. 3. c. 68. s. 5. before the justices, who make an order of bastardy, does not dispense with the necessity of giving such justices notice of appeal against the order, the statute requiring the party to give notice of bringing such appeal, "and of the cause and matter thereof."

But held, that a parol notice of such appeal, and of the cause and matter thereof, will be sufficient.

PEARSON on a former day had obtained a rule, calling upon the defendants to shew cause why a writ of mandamus should not be directed to them, commanding them to cause continuances to be entered, and hear the appeal of one *Joseph Oliver* against an order of two magistrates, under the 49 G. 3. c. 68. s. 5., whereby the said *Joseph Oliver* was adjudged to be the reputed father of a bastard child. It appeared, by the affidavits upon which the rule was obtained, that the order in question was made on the 30th *January*, that immediately upon the order being made, the appellant entered into the recognizance required by the statute, before the justices who made the order; and that a regular notice of appeal to the quarter sessions, to be holden on the 30th *April*, was served, on the 9th of *April*, upon the churchwardens and overseers of the parish on whose behalf the order was made. When the appeal was called on for trial at the sessions, it was objected by the respondents, that no notice had been given to the justices who made the order, of the intention

to bring the appeal, and of the cause and matter thereof, as required by the statute; and upon the sessions holding such notice to be necessary, the appellant offered to prove, that, previous to entering into the recognizance, he gave a parol notice to the justices who made the order, of his intention to appeal against it, and of the cause and matter of such appeal; but the sessions would not allow such notice to be proved, and dismissed the appeal. The rule was obtained upon two grounds; first, that the entering into the recognizance before the justices who made the order, dispensed with the necessity of giving them a notice of appeal; and, secondly, that in case a notice to the justices was necessary, the sessions ought to have received the evidence of a parol notice, which was tendered by the appellant.

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against
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SALOP.

Russell now shewed cause. As to the first ground upon which the rule had been obtained, it may be admitted, that if the statute, under which this order was made, had merely required that the justices making the order should have notice of the appeal, it might be difficult to contend, after the cases of *Rex v. The Justices of Leeds* (a) and *Rex v. The Justices of Essex* (b), that a sufficient notice had not been given by the appellant entering into the recognizance before them, at the time they made the order. But as the statute requires that the justices should not only have notice of the intention of the party to bring an appeal, but should also have notice “*of the cause and matter thereof*,” it seems clear, that the recognizance could not dispense with the notice required by the statute, inasmuch as no information, as

(a) 4 T. R. 583.

(b) 4 B. & A. 276.

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 against
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to the cause and matter of the appeal, could be communicated to the justices by the terms of the recognizance. Both in s. 5. and s. 7. of the statute, the notice and the recognizance are mentioned, as distinct and independent proceedings. [*Bayley J.* Supposing the argument to be correct, that the entering into the recognizance was not a sufficient notice within the statute of “the cause and matter of the appeal,” how can the other ground, upon which the rule has been obtained, be answered, viz. that evidence of the parol notice ought to have been received by the sessions?] It appears, from the affidavits filed in answer to the rule, that it is the practice, and one of the standing orders of the sessions for the county of *Salop*, for all notices of the trial of appeals in that court to be in writing; and this is a reasonable practice of the court of quarter sessions which this Court will sanction. In *Paley on Convictions*, 202, in speaking generally of appeals allowed by statutes, it is laid down that “the notice, where the statute requires any, should be in writing.” Besides, as in this case the statute directs a notice to be given of the “cause and matter” of the appeal, it must be presumed, that a notice in writing was contemplated, though not expressly required by the words of the statute, as the justices can not be expected to remember the cause and matter of an appeal contained in a parol notice, which may possibly be minute and circumstantial, and may be given at a time when the justices are too much occupied with other business, to make a memorandum of the cause and matter which it contains.

Pearson, contra, was stopped by the Court.

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against
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BAYLEY J. I am of opinion, that in this case the sessions ought to have received the evidence of the parol notice of appeal which was tendered by the appellant. It may be convenient, that a notice of appeal, particularly where it is a notice of the cause and matter of the appeal, should be in writing; and in many cases the statute giving the appeal requires that there should be a written notice; but we cannot say that a notice in writing is necessary, where it is not required to be in writing by the clause in the statute, which directs a notice to be given. An appeal is usually allowed by statute on certain conditions; and when one of those conditions is, that the party appealing shall give a notice of his appeal, it would be to add a further condition, if we were to hold that such notice must be in writing.

HOLROYD J. concurred.

Rule absolute. (a)

(a) *Abbott C. J.* and *Best J.* had left the Court.

1821.

Friday,
June 29th.

FAITH *against* The East India Company.

By a charter-party, freight was agreed to be paid for the use or hire of the ship at a certain rate per ton, for a voyage out and home, in manner following, viz.: a certain sum in advance on the ship's clearing outwards, and the residue half in cash and half in approved bills, upon the delivery of the homeward cargo; the owner also appointed C. S. master, at the request of the charterer, who executed a bond, conditioned for the faithful performance of the master's duty; and the

DEBT for money had and received. Plea nil debent.

The cause was tried before *Abbott C. J.* at the *London* Sittings after *Trinity* term, 1819, when a verdict was found for the plaintiff, for the sum of 7042*l.*, subject to the opinion of this Court, upon the following case. The plaintiff was owner of the ship *Eliza*, of which *Charles Sivrac* was master, and on the 14th of *June*, 1816, entered into a charter-party with *John Barton Gooch*, which contained provisions, that the ship should take on board a cargo, and proceed to *Bengal*, and being arrived there, give notice thereof to the agents of the freighter; and make a right and true delivery of the cargo unto them, agreeable to bills of lading: and that after such delivery, the master should take on board from the agents of the freighter, at *Bengal*, all such other lawful goods as they might think proper to ship, and proceed back to *London*, and being arrived there give notice thereof to the freighter, his executors,

owner expressly instructed C. S. to be careful to sign all bills of lading with the clause, "freight payable as by charter-party." The ship was consigned to C. and Co., in *Calcutta*, by whom she was put up, for her homeward voyage, as a general ship, and different merchants shipped goods by her, C. and Co. taking for homeward freight bills payable 60 days after delivery of the cargo; and a new master having been appointed by C. and Co., in conjunction with C. S., signed bills of lading with the clause, "paying freight agreeable to freight bill." The freight bills were made payable in *London* to B. and Co., to whom the charterer was indebted for advances on the outward cargo, and who, as well as C. and Co., were cognizant of the terms of the charter-party: Held, that the owner of the ship had a lien on these goods to the extent of the homeward freight.

C. and Co. also put on board the ship goods purchased by them on account of the charterer; but he being indebted to them, and B. and Co., their agents, those goods were by the bill of lading consigned to B. & Co.: Held, that as between the owner of the ship and B. and Co. the goods were to be considered as the goods of the charterer, and liable to the owner's lien on them for the freight due by charter-party

In the charter-party, the freighter promised to pay and defray two-thirds of the port charges: the owner having paid the whole, was held to have no lien on the goods shipped for those charges.

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&c. and make a right and true delivery of the homeward cargo unto him or them, agreeable to bills of lading, that might be signed for the same, and then end the voyage. Freight to be paid by *Gooch* for the use or hire of the ship, for the whole of her voyage, at the rate of 16*l.* sterling per ton, register measurement of the ship, together with 5 per cent. primage thereon, such freight and primage to be paid in manner following, that is to say, the sum of 500*l.*, or so much thereof as the freight of the outward cargo might amount to, calculated in the usual manner, on the day of the ship's clearing outwards; and the remainder, on a right and true delivery of the homeward cargo, in manner following, viz. one moiety in cash, and the other moiety by approved bills, payable at two months' date from that period. And the freighter further promised to pay and defray two-third parts of all port-charges, (pilotage and lights dues excepted,) which the ship might incur during the voyage. There was added to it the following memorandum: "It is hereby agreed, that the expences of the ship in *India* are to be advanced by the freighter's agents at the exchange of the day; and letters of advice are to be written and sent to the owner, stating the amount of such advances." The charter-party was entered into by *Gooch*, on behalf of himself and *Sivrac*, who had previously agreed with him to be jointly interested in freighting the ship, and in an adventure of goods to be sent out by them to the *East Indies*, and there sold, and other goods to be purchased with the proceeds thereof, and brought home to *England*, on their joint account. Upon the recommendation of *Gooch*, the plaintiff appointed *Sivrac* master of the ship for the voyage. On the 15th of

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August, Gooch and Sivrac executed a bond to the plaintiff, conditioned for the faithful performance of *Sivrac's* duty, as master. On the 13th of *August, 1816*, the plaintiff delivered a letter of instructions to *Sivrac*, as master, containing amongst other things, as follows: "It is my particular request, that you will be careful to sign all your bills of lading, with the clause of freight, payable according to charter-party inserted therein, before you sign the same, as well as the usual clause of quantity and contents unknown, and to cancel all the bills of loading for the outward-bound cargo when delivered." *Gooch and Sivrac* having purchased divers goods to form part of the outward cargo, the former applied to the house of *Bazett and Co.* merchants in *London*, the real defendants, for a loan of money on the security of the cargo, proposing that it should be consigned to the house of *Colvins and Co.*, at *Calcutta*, as the agents of *Bazett and Co.*, in order that *Colvins and Co.* might sell the goods, and out of the proceeds retain for the use of *Bazett and Co.*, so much money as they should advance for *Gooch and Sivrac*, and purchase other goods with the residuc, if any, for and on account of *Gooch and Sivrac*, to be consigned to *Bazett and Co.* who were to receive the homeward goods as the agents of the parties interested therein. *Bazett and Co.* agreed to this proposal, and advanced the sum of 4218*l.* 12*s.* 1*d.* for that purpose, and received from *Gooch and Sivrac* a bill for 3000*l.*, drawn by them on *Colvins and Co.* the consignees of the goods sent by *Gooch and Sivrac* to *Calcutta*, as a security for part of these advances; and as a further security, bills of lading of the outward cargo were sent by *Gooch and Sivrac* in the ship, made deliverable to *Colvins and Co.* at *Calcutta*, to whom the ship

ship was consigned. When *Bazett* and Co. agreed to advance *Gooch* money, on the security of the outward cargo by the *Eliza*, it was agreed, that the homeward cargo should be consigned by *Colvins* and Co. to the house of *Bazett* and Co.. Accordingly, a letter was written by *Gooch* to *Colvins* and Co. dated 12th *August*, 1816. "Inclosed you have a list of goods, which I request you to purchase in proportion to the extent of funds realized by the investment per *Eliza*, which I consign to you through the house of *Bazett* and Co.; and should you feel inclined to enable us to invest to the full amount of the enclosed list, by holding the bills of lading on the cargo, as security, I then request you to purchase, subject to such alterations as you may deem advisable, in conjunction with our friend Captain *Sivrac*. I forward you also a copy of the charter-party for your guidance, and by which you will be enabled to judge whether it will be most for your interest to take the current freight of the day, or to invest the goods above-mentioned." On the 14th of *August*, 1816, *Bazett* and Co. wrote, with the outward cargo, to *Colvins* and Co., parts of which correspondence were as follows: "We are commissioned by *Gooch* and *Sivrac* to consign their interest to your management. These gentlemen have chartered the *Eliza* for the voyage to *Bengal*, and home; and have shipped on their own account an investment, of which we have to hand you herewith the invoice, bills of parcels and bills of lading. No. 5 is a letter to you from themselves touching the return cargo, as far as it relates to their own funds. We think you may find it necessary to make considerable alterations in the memorandum which it incloses, and this you will in course do with the concurrence of *Sivrac*. The ship-

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ment, of whatever it may consist, is to be directly con-
signed to us, and, as we have to request you will pro-
cure freight for the vacant tonnage, we have further to
add, that the freight bills are to be made payable to us ;
in short, that the entire concerns of the expedition are
to pass into our charge. This is clearly and explicitly
understood between *Sivrac*, *Gooch*, and ourselves. No. 6
is a copy of the charter-party, with the provisions of
which you will have the goodness to comply as accurately
as may be practicable." The ship arrived at *Calcutta*, in
March, 1817, under the command of *Sivrac*, who, on the
25th of that month, wrote a letter to the plaintiff, in which
he says, " I shall be mindful of the tenor of your instruc-
tions." Soon after this *Sivrac* gave up the command of the
ship at *Calcutta*, and *Colvins* and Co. concurred with *Sivrac*
in appointing one *Robert Oliver* master in his stead.
Colvins and Co. sold the outward goods at *Calcutta*, and
out of the proceeds thereof appropriated the value of
3000*l.* to the discharge of the bill drawn on them in
favour of *Bazett* and Co. for their advances ; they also
put up the ship as a general ship at *Calcutta*, and va-
rious merchants there shipped goods on board of her,
consigned to different persons in *London*, and respec-
tively drew instruments for the amount of the freight
agreed to be paid for the same in the following form.
" Exchange for 234*l.* sterling, *Calcutta*, 24. *April*, 1817.
Sixty days after the safe arrival of the ship *Eliza* at the
port of *London*, with the goods on board as specified in
the annexed list, and delivered agreeable to the bill of
lading, pay this our first of exchange (second and third
of the same tenor and date unpaid) to Messrs. *Bazett*
and Co., or order, the sum of 234*l.* value in freight per
said ship." These instruments were indorsed by *Col-*

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vins and Co., and made payable to the order of *Bazett* and Co., to whom they were remitted; and all of them, except three, were accepted by the consignees; but none of them were paid, in consequence of the disputes between the plaintiff and *Bazett* and Co. *Colvins* and Co. did all the business of the ship at *Calcutta*, and *Oliver*, the master, signed bills of lading for the goods in the following form: "Shipped by, &c., to be delivered, &c. they paying freight for the said goods agreeable to freight bill, with primage and average accustomed." The state of trade was unfavourable at *Calcutta* when the *Eliza* arrived there, and *Colvins* and Co., being unable to procure a full freight for her, except on very low terms, thought it more advantageous for *Gooch* and *Sivrac* to purchase goods on their account to fill up the ship than to accept of the freights on the low terms offered, and accordingly they bought for and on account of *Gooch* and *Sivrac* 140 bales and 100 half-bales of cotton, which they marked with the letters G. & S., and shipped on board the *Eliza*, consigned by the bills of lading, by *Colvins* and Co. as shippers, to *Bazett* and Co. On the 10th *May*, 1817, *Colvins* and Co. wrote to *Bazett* and Co. as follows: "It is with no little disappointment that we add, that this small sum comprises the whole of the ship's freight, excepting for the cotton shipped on *Gooch* and *Sivrac*'s own account, which is of course not drawn for." At the time the *Eliza* sailed from *Calcutta* on her homeward voyage, a great deal remained to be done by *Colvins* and Co. in regard to the sale of the outward cargo, consigned to them, and the making up of the accounts thereof. In their letter of the 10th *May*, 1817, they had informed *Bazett* and Co. in general terms, that they would have to ac-

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count with *Gooch* and *Sivrac* for the property therein mentioned, but that complete accounts could not be sent at that time, for the whole of the outward cargo was not then sold, nor the whole of the proceeds of the part then sold received. The ship arrived in *London*, in *December*, 1817, under the command of *Oliver*, and, during the whole of the voyage, was navigated by a crew who were hired, paid, and maintained by the plaintiff. *Gooch* and *Sivrac* were then in insolvent circumstances, and afterwards became bankrupts. The freight then due to the plaintiff, according to the charter-party, amounted to 6668*l.* 7*s.*, and the port charges to 310*l.* 7*s.*, for the amount of which the action was brought. No part of that sum had been paid to the plaintiff. By the acts establishing the *East India* Dock, the owners of ships, by giving notice of their demand, retain their lien for freight upon goods landed there, and upon the proceeds thereof, when sold by the *East India* Company. The plaintiff having demanded payment of the sum of 6978*l.* 14*s.*, according to the charter-party, immediately gave notice to the different consignees on whom the instruments were drawn, not to accept or pay the same, but to pay to him the freight of the goods consigned to them. He afterwards, as well as *Bazett* and Co., gave regular notice to the *East India* Company not to deliver up the goods till freight was paid. The whole of the homeward cargo was sold in the usual manner at the sales of the *East India* Company, and they received the proceeds thereof. With the consent of *Bazett* and Co. and the plaintiff, the proceeds of the goods belonging to the different shippers were paid to the different consignees thereof, deducting the freight, amounting to 4562*l.* 6*s.* 7*d.*, which the *East India*

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India Company retained for the use of the persons entitled to receive the same. They likewise retained the sum of 2416*l.*, being the whole of the proceeds of the cotton marked G & S., for the use of the plaintiff, if it should be found that he, as owner of the ship, had a lien to that amount on those goods; and if it should be found that he had no such lien, then for the use of *Bazett* and Co. Of the sum of 4218*l.* 2*s.* 1*d.*, originally advanced by *Bazett* and Co., there remained still due to them a considerable sum. There was likewise due to them, on other dealings with *Gooch* and *Sivrac* jointly, and from each of them separately, a considerable sum of money. In *Michaelmas* term, 1818, the plaintiff commenced this action, whereupon the *East India* Company filed a bill of interpleader in the Exchequer, making the plaintiff and *Bazett* and Co. defendants in such suit. On a motion in that court, it was ordered that the action should be defended by *Bazett* and Co.

Campbell was to have argued on behalf of the plaintiff, but the Court now called upon

Parke for the defendant. There are three questions in this case; 1st, Whether the plaintiff is entitled to any lien on the goods shipped by the different sub-freighters; 2dly, If he is so entitled, then to what extent he has a lien on the goods shipped by *Colvins* and Co., consigned to *Bazett* and Co.; and, 3dly, Whether he has any lien at all for the port-charges. As to the first of these questions, it is to be observed, that, in *Hutton v. Bragg* (a), it was held that the owner

(a) 2 *Marsh.* 559.

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 DIA Company. no lien on the goods of the subfreighters. It must be
 admitted, however, that *Saville v. Champion* (a) is at
 variance with the authority of *Hutton v. Bragg*, and
 that *Christie v. Lewis* (b) has since over-ruled it. But
 still, according to all the cases, the owner has a lien
 only on the goods of the charterer, for the freight due
 by the charter-party, and on the goods of the other
 persons put on board the lien is confined to the freight
 due upon delivery, according to the terms specified in
 the bill of lading. In *Paul v. Birch* (c), Lord *Hard-
 wicke* says, "The bankrupts (who were in that case the
 charterers of the ship) made an agreement with the
 owner on their own account, and not on the part of
 the merchants, and therefore the merchants are not
 liable. Otherwise they would be in the hardest case
 imaginable, for they would be liable to any private
 agreement between the occupiers of the ship, and the
 original owners." And he adds, that the person letting
 out the ship must take care that the charterer is a
 substantial person, otherwise he will suffer by his
 neglect. The result of that case was, that the mer-
 chants were held liable to pay to the owner the freight,
 which, by their agreement, was to have been paid by
 them to the charterer on delivery of the goods. And
 the lien of the owner was allowed to that extent. In
Mitchell v. Scuipe (d), and in *Christie v. Lewis*, the same
 rule prevailed, and the rule is consistent with justice,
 for otherwise the law would allow the charterer to
 pledge the goods of the sub-freighter for his own debt.
 Now, if this principle be applied to the present case,

(a) 2 B. & A. 505.

(c) 2 Atk. 621.

(b) 2 B. & B. 410.

(d) 4 Campb. 298.

it will appear that here nothing is payable to the charterer on delivery, and consequently he could have no lien on the goods. The owner, therefore, who stands in his situation, has no lien on the goods of the sub-freighter. The real question is, whether there is any thing by which the charterer of this ship is absolutely restrained from making any contracts he may chuse with the sub-freighters. And if there is nothing to prevent him from stipulating for any freight, and on any terms that he may please, the owner must take the consequences following from such stipulation. There is nothing in this charter-party specifying in what form the bills of lading shall be taken. Suppose the charterer had received at *Calcutta* the freight in advance for the goods. Could it be contended, that then the sub-freighters would be bound to pay it over again to the owner of the ship? If so, why may they not make any contract with the charterer, which they may chuse to do, provided it be not fraudulent with respect to the owner of the ship. There is nothing fraudulent in what has been done here, for if these bargains had not been made, the ship would not have had these goods on board; and then the owner would not have had any freight to receive. Besides it cannot be put on the ground of fraud; for the Court never infer fraud unless it be found by the jury, which is not the case here. But supposing that the sub-freighters are liable, then the second question is, as to the extent of the plaintiff's lien on the goods put on board by *Colvins* and Co. at *Calcutta*. It is contended that these are the property of *Gooch* and *Sivrac*, and as such, liable to the freight per charter-party. But this is not so. The goods are deliverable to the agents of *Colvins* and Co. No pro-

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perty, therefore, passed to *Gooch* and *Sivrac* by their being put on board the ship. The property in such cases vests immediately in the consignee of the bill of lading, and *Haille v. Smith* (a) is a direct authority in point. There the property was held to be in the consignee, although the profit or loss was to fall upon the consignors, as it is in this case to fall on *Gooch* and *Sivrac*, *Evans v. Marlett* (b) is to the same effect. The legal owners, therefore, of these goods were *Bazett* and Co., to whom they were consigned, and in that case the lien of the plaintiff will be confined, at all events, to the freight due on the bill of lading. As to the third point; at all events, the owner has no lien for the sum paid for port-charges. His remedy is by action against the charterer, for a breach of covenant in not paying his proportion of them; but there is no authority for saying, that if the owner pays them, he has a lien for the amount. There is no lien for dead freight, or for demurrage, which are analogous cases.

Campbell in reply, as to the third point. No time is stipulated by the charter-party when these charges are to be paid. The amount can only be ascertained at the end of the voyage, and they are in fact usually considered as part of the freight. If so, there is the same lien for them as for the freight.

ABBOTT C. J. It is very satisfactory to my mind to find, that the law enables us to decide this case in favour of the plaintiff. By the very terms of this charter-party, the freight was to be paid on the delivery of the goods.

(a) 1 Bos. & Pul. 563.

(b) 1 Ld. Raym. 271.

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Then the question is, whether *Gooch* can, by a collusive bargain with *Colvins* and Co., and other third persons, permit them so to ship goods as to deprive the owner of his lien. It is not necessary to decide what effect the payment of the freight, if made before the goods were laden on board in the *East Indies*, would have had. If such an event had happened, which however is not very probable, perhaps the owners' lien for freight might have been thereby defeated. But in this case the freight has not so been paid, and the only question is, whether this bargain to receive the freight by freight-bills made between *Gooch* and *Sivrac*, and *Colvins* and Co., (the latter being acquainted with the terms of the original charter-party) can be allowed to have effect, so as to deprive the owner of his lien. If it could succeed, a gross fraud, as it seems to me, would be practised. By a contrary decision, we shall injure no one, for as to the sub-freighters, who are wholly unconnected with the charterer, it is quite immaterial to whom they pay the freight due for the conveyance of their goods, and as to the goods shipped by *Colvins* and Co., they must either stand in the same situation as those of the other freighters, or, if considered as the goods of *Gooch* and *Sivrac*, must be liable to pay the freight as per charter-party. The case of *Hutton v. Bragg* is very distinguishable from this. In that case, there was no connexion between the hire of the ship and the delivery of the cargo. But here, by the terms of the charter-party, there is. For the residue of the freight is stipulated to be paid upon the delivery of the homeward cargo. I think, therefore, that the owner of the ship was entitled to a lien upon the goods put on board by the different shippers abroad, to the extent of

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the freight due upon each of those consignments. The goods purchased by *Colvins* and Co., for *Gooch* and *Sivrac*, are in a different situation. I am of opinion, that as, between these parties, those are to be considered as the goods of *Gooch* and *Sivrac*, and in that case they are liable to the lien of the owner of the ship to the full extent of the freight due on the charter-party. If this had been a question between *Gooch* and *Colvins* and Co., the case might have been different. Upon the third point, I am of opinion, that the owner of the ship is not entitled to any lien for the port-charges, and that, therefore, the verdict must be reduced to that extent.

BAYLEY J. There is no authority for saying that the owner of a ship has a lien for port-charges, and where there is no usage on the subject, we ought not to determine in favour of a lien, unless it be clear, from the terms of the charter-party, that it exists. Now the stipulation as to the payment of the port-charges, is in a different part of the charter-party, from the clause relative to the payment of freight. If the parties had intended that there should have been a lien for these charges, the charter-party would have contained an express stipulation, that the remainder of the freight and two-thirds of the port-charges should be paid on delivery of the homeward cargo. That not being so stated, I am of opinion, that the plaintiff is not entitled to any lien on this head. Upon the general question, I have no doubt that the owner has a lien on those parts of the cargo belonging to *Colvins* and Co., and to third persons: by the very terms of the charter-party, that lien is given. Its extent, however, as to the goods belonging to third

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persons, is, by the case of *Paul v. Birch*, regulated and confined to the amount of the freight which the goods, when taken on board, were liable to pay. But it is contended here, that the fact of taking bills for the freight, payable after the delivery of the goods, deprives the owner of the ship of his lien. I think, however, that it is not so, and that if it were so, the greatest injustice would follow. Here *Gooch* hires the ship on freight, he stipulates that the freight shall be paid on delivery of the homeward cargo, he applies to have *Sivrac* appointed master, and the latter receives express instructions to make out the bill of lading for the homeward cargo, stipulating that freight shall be paid, as per charter-party. If he, therefore, had continued captain and done his duty, he never would have taken goods on board on which the owner would have no lien. But it appears, that, in *India*, *Sivrac* was removed, and a new captain appointed, and goods are taken on board, for which a bill of lading, differently worded, is made out. Now, at the time when all this was done, *Colvins* and Co. were fully acquainted with the terms of the charter-party, and knew that this was contrary to the duty which *Sivrac* owed to the plaintiff; and *Bazett* and Co. were also acquainted with this fact. Here the bills given for the freight have not been paid to *Bazett* and Co. by the owners of the goods. The case stands, therefore, in the same situation, as if those bills had not been given at all. And then no doubt can be entertained on the authorities, that the owner of the ship is entitled to receive the freight. As to the last point, I think that the plaintiff is entitled to a lien on the cotton shipped by *Colvins* and Co., to the extent of the freight due by the charter-party. For he is entitled to a lien to

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that extent on the goods of *Gooch* and *Sivrac*. These goods, it appears, were bought by *Colvins* and Co. on account of *Gooch* and *Sivrac*. It is true the bill of lading describes *Colvins* and Co. as the shippers, and makes the goods deliverable to *Bazett* and Co., subject, as the goods of *Gooch* and *Sivrac*, to certain payments, before they could be delivered over to them. But it appears to me, that they are to be considered by the owner of the ship as the goods of *Gooch* and *Sivrac*, and liable to the freight. If the freight exceeds their value, there will be nothing for *Bazett* and Co. to receive; if not, they will have the preferable claim to the surplus. I think, after the delivery of these goods on board the ship, that they were no longer in the possession of *Colvins* and Co., but of *Gooch* and *Sivrac*, and that the plaintiff had a right so to consider them. On the whole, I think there must be judgment for the plaintiff, for the whole claim, with the exception of the sum due for port-charges.

HOLBOYD J. I am of opinion that the plaintiff is entitled to recover his whole demand, with the exception of the sum claimed for port-charges. These charges would, if not specially provided for by the charter-party, fall on the owner of the ship. Then do they, by this charter-party, become freight, or in the nature of freight? I think not; and that the plaintiff is not entitled to a lien for them. As to the rest of the case, I think he ought to recover. I agree in the observations already made, as to the question relative to the lien on the goods shipped by third persons, and shall advert only to the goods purchased by *Colvins* and Co. on account of *Gooch* and *Sivrac*. It is contended, that these must be considered as the property of *Colvins* and Co. I think not; and that they must be considered

sidered as the property of *Gooch* and *Sivrac*, and as not continuing in the possession of *Colvins* and Co.; from their delivery on board the ship. *Colvins* and Co. might have a lien on them, but that would not deprive the owner of the ship of his, which, I think, must be considered as a prior lien on the goods. If it could, then the person who had a bare lien on the goods would be in a better situation than the owner of the goods himself. I think, therefore, that on these goods the plaintiff is entitled to a lien to the full extent of the freight as per charter-party.

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BEST J. I am entirely of the same opinion. The only question worthy of consideration is that relative to the goods shipped by *Colvins* and Co. I think, as between these parties, they must be taken to be the goods of *Gooch* and *Sivrac*, and liable to be detained for the payment of the general freight. The only interest in them which *Colvins* and Co. can have, is a lien for the debt due from *Gooch* and *Sivrac* to them. But if this could deprive the owner of the ship of his lien, then the creditors of *Gooch* and *Sivrac*, would be placed in a better situation than *Gooch* and *Sivrac* themselves. I think this cannot be; and that they are only entitled to receive the surplus, after deducting the general freight due by the charter-party. The cases cited in argument only apply to disputes between the consignor and consignee as to the goods; but they do not affect the rights of the ship owner, which are, in this case, paramount to both. On the other points, I agree with the rest of the Court.

Judgment for the Plaintiff.

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A plea of foreign attachment stated the custom to be, that if the plaintiff in the Mayor's Court allege that any other person or persons owes or owe to the then defendants any money that may be attached, and that the plaintiff below alleged that he and another person owed to the defendant below a certain sum of money, held that such plea is bad; inasmuch as the person owing the money to the defendant must, within the custom as pleaded, be a different person from the plaintiff.

Quære, whether a custom for a party to attach money in the hands of himself and partner, could be supported.

DECLARATION in assumpsit for money had and received, money lent, &c. Plea, general issue as to all but 1058*l.*, and as to that sum, that the city of *London*, from time immemorial, hath been an ancient city, and that there hath been a custom, used and approved of within the city, that if any person affirm a plaint in debt against another in the *Mayor's Court*, upon such plaint, it hath been commanded to a *Serjeant* at mace of the court to summon the defendant in such plaint, to appear in court to answer the plaintiff; and if such *Serjeant* at mace return that the defendant had nothing within the city, whereby he can be summoned, nor is to be found within the city; and such defendant doth not appear; but makes default, and it be alleged by the plaintiff in the plaint, that *any other person* or persons owes or owe to any such defendant any sum amounting to the debt in the plaint specified, or any part thereof, then, on the petition of the plaintiff, it is commanded by the court to a *Serjeant* at mace to attach such defendant by such sum of money being in the hands of such other person or persons. The plea then, after setting out this custom at length in the common form, stated, that the defendant *Hullett*, before the commencement of this suit, affirmed a plaint against *Nonell*, the present plaintiff, for 5000*l.*, and upon *Nonell's* being summoned and not appearing, it was alleged by the said *John Hullett*, that he and *Charles Widder* owed to *Nonell* 2500*l.*, the proper monies of *Nonell*; and that they then had the same in their hands, and there-

therefore the said *John Hullett* prayed process to attach *Nonell* by that sum so being in the hands of *Hullett* and *Widder*. The plea then stated the issuing of process to attach that sum, the appearance of the plaintiff, the officer's return, *Nonell's* non-appearance at four courts, as well as the issuing of process to warn *John Hullett* and *Charles Widder*, the garnishees, to appear to shew cause why *Hullett* ought not to have execution of the money attached in their hands, their appearance and pleading that they had no money in their hands belonging to *Nonell*, upon which issue was joined, and the finding of the jury, that they *Hullett* and *Widder* had, at the time of issuing the attachment, 1058*l.*, belonging to *Nonell*, and judgment was given, that *Hullett* should have execution for that sum. The plea further stated the judgment and execution to be still in full force. To this plea there was a general demurrer and joinder.

1821.

 NONELL
against
HULLETT.

Chitty, in support of the demurrer. The plea cannot be supported; a party cannot attach money in his own hands; for he cannot be both plaintiff and defendant. In *Hope v. Holman* (a), the same objection was made, but the judgment proceeded on another point.

Bolland, contra. This is distinguishable from the case cited, for there a man had attached money in his own hands; here the money is in the hands of a different person, viz. of himself and his partner, and even as partners, they may be considered as different parties, having distinct interests and property. The

(a) 1 *Brownlow & Goldesbor.* 60.

1821.

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against
HULLETT.

practice has universally prevailed of attaching money under similar circumstances. The case of *Weller v. Rucker* (a) only decided, that money obtained under a foreign attachment is not a compulsory payment, so as to effect a discharge of the garnishee's debt, unless execution be executed. Here it was executed.

ABBOTT C. J. The question in this case is, whether the defendants have brought themselves within the custom as pleaded by them, that is, as stated to be, that if any person affirm a plaint in debt against another, and it be returned, that the defendant in such plaint has nothing within the city, and it be then alleged by the plaintiff in the plaint that *any other person or persons owes or owe* to such defendant any money, then that that money may be attached. Here *John Hullett* was the plaintiff in the mayor's court; and upon its being returned, that *Nonell* had nothing within the city or liberties whereby he could be summoned, nor was to be there found, *Hullett* then alleged, that he and his partner had in their hands a sum of money belonging to *Nonell*, and then he prays that that sum may be attached. Now *Hullett* and his partner do not come within the description of "other person or persons," as stated in this plea. If it be the custom of *London*, that a man, having a separate debt due to him from another, may attach money in the hands of himself and his partner, belonging to that other, that custom should be so pleaded, and then the other party may deny the custom so put upon the record, and its validity may be solemnly argued. The custom pleaded in this case is, that the plaintiff in

(a) 1 *Brod. & Bing.* 491. See also *Bayne v. Bayne* 1822

the

the mayor's court may attach money in the hands of "other person or persons," but not that he may attach money either in his own hands, or money that is in the joint possession of himself and his partner. My present judgment, therefore, will not in any respect interfere with the customs of the city of *London*. All that I say is, that the facts disclosed in this plea do not bring the defendants within the custom as pleaded. There must be judgment for the plaintiff.

1821.

—
 NOKEL
 against
 HULLETT.

BAYLEY J. I am of the same opinion; *Hullett* in this case was both plaintiff and defendant in the suit in the mayor's court. How could he have execution against himself? In *Wetter v. Rucker*, it was held, that money obtained of a garnishee under a foreign attachment would not operate as a discharge of a debt due from the garnishee to the defendant in the mayor's court, unless a party were forced to pay it against his will. Now how can these defendants be said to have been compelled so to pay the money, when one of them institutes the suit in the mayor's court? I have great difficulty in saying that such a custom, if properly pleaded, could be supported. I agree, however, that the facts disclosed in the plea do not support the custom as pleaded; for, in order to bring the case within it, it must be shewn that the plaintiff in the mayor's court and the garnishee are different persons. That not being so, I think, there must be judgment for the plaintiff.

Judgment for plaintiff. (a)

(a) See the following authorities, as to the manner the custom is pleaded with respect to the person having the money in his hands: — *Banks v. Scif*, 5 *Tunst.* 234., in notes, "any other person." *Morris v. Ludlam*, 2 *H. Bl.* 362., "any other person." *Vidian's Entries*, 19., "Aliqua alia persona." 1 *Roll's Abridg.* 554., "ascun autre." So in the *Year Book*, 22 *Edw.* 4.,
 M. T.

1821.

NONELL
against
HULLETT.

M. T. pl. 11., "ascun home." See *Godbolt*, 400., "one within the city." and also *Coke's Entries*, 139. In *Dyer*, 83. a *Roberthon v. Norey King at Arms*, the recorder of *London* certifies, que, si home sue un aut devant le Maior, &c. et un tierce person est indet à le defendant, in tant come le suite del plaintiff est, et per le custom de la ley d'attachment, le tierce person est condempne et jugement done envers luy, que nient obstant le jugement, si nul execution soit sué envers le tierce person, le plaintiff poit resotter à aver jugement et execution envers le defendant, esteant son principal detteur, et il auxy poit suer le tierce person par son det, nient obstant le jugement unexecute," &c.

Friday,
June 29th.

BINNINGTON against WALLIS.

Declaration stated that plaintiff had cohabited with defendant as his mistress, and that it was agreed that no further immoral connexion should take place between them, and that defendant should allow her an annuity as long as she should continue of good and virtuous life and demeanour; and thereupon, in consideration of the premises, and that plaintiff would give up the annuity: defendant promised to pay as much as the annuity was reasonably worth. Held bad, upon general demurrer.

DECLARATION stated, that before the making of the promise and undertaking, the plaintiff had cohabited with the defendant as his mistress; and an immoral connexion and intercourse had existed between them for a long space of time, to wit, for the space of twelve years; and the plaintiff had thereby been greatly injured in her character and reputation, and deprived of the means of honestly procuring a livelihood; and that, before the time of the making of the promise, to wit, on the 1st of *January*, 1816, at &c. the plaintiff wholly ceased to cohabit with the said defendant, as his mistress, and to have any immoral intercourse with her, and thereupon it was determined and agreed between them, that no immoral intercourse or connexion should ever again take place between them; and that the defendant, as a compensation for the injury so sustained by the plaintiff, should pay and allow to the plaintiff, the quarterly sum of 10*l.*, while she should be and continue of good and virtuous life, conversation, and demeanour; and thereupon, in consideration of the premises;

mises ; and that the plaintiff, at the request of the defendant, would resign and give up the said quarterly sum, he undertook to pay her so much money as the said quarterly sum was reasonably worth, in order to enable her to continue to live in a virtuous and decorous manner. The declaration then averred, that the plaintiff did resign and give up the said quarterly sum, and the same from thence wholly ceased and determined ; and that she had always, from the time of the cessation of the immoral connexion, lived in a virtuous and decorous manner, and been of virtuous life, conversation, and demeanour. It then averred, that the quarterly sum was reasonably worth 400*l.* ; and then alleged as a breach, non-payment by the defendant. The other counts omitted any mention of the quarterly allowance, and in other respects were similar to this. To this declaration, there was a general demurrer.

1821.

BINNINGTON
against
WALLIS.

Parke in support of the demurrer. There is no sufficient consideration to support the promise laid in this declaration. It is not stated that the plaintiff was seduced. There is not even a moral obligation to provide for a woman for past cohabitation. As to the giving up of the annuity, mentioned in one count, that depends upon the same question, for the only consideration for that annuity was the past cohabitation.

Holt, contra. There was a moral consideration for the promise stated in this declaration, for it must be taken (as the contrary does not appear,) that the defendant seduced the plaintiff, and if that be so, he was morally bound to make some provision for her. In *The Mar-*

1831.

—
 BURNHURST
 against
 WALLIS.

Marchioness of Annandale v. Harris (a), the Court held a bond given to a seduced woman, good; and if it were sufficient to support a bond, it must be equally so to support an express promise. So also past cohabitation was deemed sufficient consideration for a bond, in the case of *Carew v. Stafford*, there cited; and in the case of *Turner v. Vaughan* (b). And secondly, there is a valuable consideration in this case, inasmuch as the plaintiff gave up her annuity.

Per Curiam. The declaration is insufficient. It is not averred, that the defendant was the seducer, and there is no authority to shew that past cohabitation alone, or the ceasing to cohabit in future, is a good consideration for a promise of this nature. The cases cited are distinguishable from this, because they are all cases of deeds, and it is a very different question, whether a consideration be sufficiently good to sustain a promise, and whether it be so illegal as to make the deed which required no consideration void. There must therefore be judgment for the defendant.

Judgment for defendant.

(a) 2 *Perr* W. 433.

(b) 2 *Wils.* 339.

Saturday,
 June 30th.

PHILIPS *against* MORGAN, Esq.

Practice.

[IN this case a testatum fieri facias had been issued, returnable in last *Hilary* term, directed to the late sheriff of *Carmarthen*, commanding him to levy the sum of 85*l.* 17*s.* A rule to return this writ was obtained in *Easter* term, and he then returned that he had seized goods

goods of the defendant, value unknown, which remained in his hands for want of buyers. A writ of non omittas distringas was afterwards issued, returnable on Wednesday next after five weeks of Easter, directed to the present sheriff, commanding him to distrain the late sheriff so that he expose to sale the goods taken by him in execution. Upon a rule to return that writ, the present sheriff returned that he had distrained to the value of forty shillings.

1821.

Prima
against
Monsieur.

Littledale now moved to increase issues, upon an affidavit, stating those facts, and also that, in consequence of this delay, further costs had been incurred, for which, he contended, the late sheriff was liable; and he cited *Robt. v. Plaistow*. (a). The Court ordered him to take 100*l.* for that purpose.

Rule absolute.

(a) 5 Burr. 2727.

as before to **DOE against ROE.**

Saturday,
June 30th.

COURTHOPE moved for judgment against the casual Practice.

ejector. It appeared, from the affidavit, that the tenant in possession resided abroad, and carried on his business by an agent residing on the premises. The service was by delivering the declaration in the usual way to the agent, and also fixing it up on the premises.

practised
not used

admitted

The Court held this to be sufficient.

Judgment accordingly.

1821.

Monday,
July 2nd.LEWIS and Others *against* OWEN.

A bill of exchange drawn by defendant in *Ireland*, and accepted and paid by plaintiffs in *England*, is a debt contracted in *England*, and cannot, therefore, be discharged by a certificate under an *Irish* commission of bankruptcy.

THIS was a rule to shew cause why an exoneretur should not be entered on the bail-piece, the defendant having obtained his certificate under a commission of bankruptcy in *Ireland*. It appeared from the affidavits, that the debt for which the action was brought, arose from the plaintiffs, while residing in *England*, accepting and paying bills of exchange drawn upon them by the defendant, while residing in *Ireland*, for his accommodation.

Campbell shewed cause, and insisted, that this was a debt arising in *England*, and that it therefore could not be barred by the *Irish* certificate. For this purpose, *Ireland* must be considered a foreign country. He relied upon *Smith v. Buchanan* (a) and *Quin v. Keefe*. (b)

Marryat and *Chitty*, contra, contended, that as the bills were drawn in *Ireland*, the debt was to be considered as having arisen there; and at any rate, that since the union, *Ireland* could not be considered a foreign country. Therefore, what discharged the defendant from the debt, in a part of the united kingdom, must discharge him from it throughout the whole.

But the Court said the debt must be considered to have arisen where the money was paid; and that a certificate under a commission of bankruptcy in *Ireland*, since

(a) 1 *East*, 6.(b) 2 *H. Bl.* 553.

the union with that country, could have no greater operation than a certificate under a *Scottish* sequestration, which was never thought to discharge a debt contracted in *England*.

1821.

 LEWIS
against
OWEN.

Rule discharged.

BUTT, Clerk, *against* HOWARD and Another. *Tuesday, July 3d.*

DEBT under 2 & 3 *Ed.* 6. c. 13. s. 1. for the treble value of tithes. The cause was tried before *Graham B.* at the last assizes for *Suffolk*, when a verdict was found for the plaintiff on the third count of the declaration, which stated, that the defendants being occupiers of certain lands within the parish of *Lakenheath*, and whilst the plaintiff was vicar and proprietor of the tithes, and whilst the defendants were so occupiers of the said land, to wit, on, &c. at, &c. did dig up a certain large quantity of potatoes, to wit, 100 pounds of potatoes, then growing upon the said land, the tithe whereof belonged to, the plaintiff, and of right ought to have been set out and paid to him as such vicar and proprietor, to wit, at, &c. Yet that defendants being subjects of this realm, and well knowing the premises, but not regarding the statute in such case made and provided, nor fearing the penalties therein contained, after the digging up of the potatoes, and before the commencement of this suit, to wit, on, &c. at, &c. did take and carry the said potatoes from the said land, where the same had been so grown, and dug up, and where the same ought to have been tithed, the tenth part thereof, or of any part thereof, not having been

Where a declaration in debt for tithes under 2 and 3 *E.* 6. c. 13. s. 1. omitted to state that the tithes had been yielded and paid, and of right ought to have been paid within 40 years next before the passing of the act : Held, that it was defective, even after verdict, and the judgment was arrested.

1821.

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against
HOWARD.

separated, divided, and set out from the nine parts thereof, nor any composition or agreement made for the tithes thereof, or of any part thereof with the plaintiff, contrary to the form of the statute, in such case made and provided. Averment, that the tenth part of the potatoes, so taken and carried away, at the time of taking and carrying away the same, was reasonably worth a large sum of money, to wit, &c. whereby, and by force of the statute, in such case made and provided, an action had accrued to the plaintiff, &c. *Scarlett*, in last *Easter* term, obtained a rule nisi for arresting the judgment on this count, on the ground that it contained no averment, that the tithes had been yielded and paid, and of right ought to have been set out and paid in kind, to the farmer or proprietor thereof, within 40 years next before the passing of the statute of 2 & 3 Ed. 6. c. 13. s. 1. And now,

Blossett Serjt. and *Storks* shewed cause. The averment is unnecessary, and even if necessary, the defect is cured by the verdict. It is quite clear, that the averment need not be proved, if made. In *Mitchell v. Walker* (a), Lord *Kenyon* says, "The usage has constantly been against the necessity of the proof contended for by the defendant under the statute. And I remember many actions tried, where the lands, in respect of which the tithes were claimed, were lately inclosed, and where the same objection, had it been available, must have prevailed, but the plaintiffs recovered in all of them." And again he adds, "The non-payment of tithe of itself signifies nothing. Tithe is every day claimed out of wastes which never paid

(a) 5 T. R. 263.

tithe before." Now if it be decided, that it needs not be proved, that is a strong argument to shew that it is not necessary to make the averment. The reason is, that the 40 years can by no possibility become material. For the parson relies on his prescriptive right to tithe, and the defendant, to exempt himself, must also set up a prescription. The statute is therefore, in fact, general, and gives the remedy in all cases where the lands are titheable. The mention of the 40 years is only in consequence of the canon law prescription, which depended on that period of time. And so it is stated by *Lord Coke* in 2 *Inst.* 653. It might as well be contended, that the plaintiff must state himself to be a liege subject of the king, which is the description in the statute. The statute is a remedial act, *Lord Selsea v. Powell.* (a) But supposing this to be a necessary averment, the want of it is no objection after verdict. In *Alston v. Buscough* (b), the declaration omitted to state, that defendant had not made any agreement with the plaintiff for the tithes. But it was held, that although this would have been ill on demurrer, it was helped by the verdict. And that is a stronger case than the present. Besides, here the declaration does state, that the tithes ought to have been set out, and that defendant did not set them out *contrary to the form of the statute*, which is in effect making the averment in question.

Scarlett and *Dover*, *contra*, were stopped by the Court.

BAYLEY J. This is the first instance which I ever saw of a declaration under the statute, upon the 2 & 3

(a) 6 *Taunt.* 297.

(b) *Carth.* 304.

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 BUTT
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Edw. 6. c. 13., in which there was not an allegation that tithes had been paid or payable within 40 years next before the passing of the act of parliament. That statute, it should be observed, introduced a new remedy for the non-payment of tithe, and in terms confines that remedy to such predial tithes as had been yielded and paid within 40 years next before the act, or of right or custom ought to have been paid. Now *primâ facie* those words must have some meaning, and must have been intended to restrain the operation of the statute to some particular tithes. And I think, that, unless that be so, it will be difficult to account for the opinions delivered by different Judges with respect to this act. In *Lord Mansfield v. Clarke (a)*, *Wilmot C. J.*, speaking of the averment that tithes had been payable, says, "This seems to be a necessary averment;" and in that case the declaration was amended, for the purpose of introducing it. Now that would not have been done, if the allegation had been, as it is now contended to be, wholly immaterial. And the observations of *Yates J.*, in *Kynaston v. Clark (b)*, afford the same argument. The case of *Mitchell v. Walker* is quite consistent with this, for there the declaration did contain the averment, and there can be no doubt that the fact might be presumed if the land was titheable, and nothing appeared to shew that the tithe had originated since the period mentioned by statute. A case may be put in which a party having lands free from tithes, might have granted them 30 years before the statute. If so, all the allegations in this declaration might be true, and yet the party would not be entitled to this remedy. I think, therefore, that

(a) 5 T. R. 264. n. a.

(b) 5 T. R. 265. n. a.

this

this was a necessary allegation, and not being contained in this declaration, I am of opinion, that on that ground the judgment must be arrested.

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HOLROYD J. I am also of opinion, that, in this case, the judgment must be arrested, upon the ground that the allegation omitted in the declaration is one required by law to be made. The uniform course of the precedents has been to insert it, and, on various occasions, it has been considered by the Judges as a necessary averment. But it is said, that the objection, if any, is cured by verdict. I am, however, of a different opinion, for all the facts necessary to bring the case within the powers of the clause must be stated. In an action on the game laws, it is necessary to allege, that the party charged with having used a dog, &c. was not qualified to use it; and in *Spieres v. Parker* (a), it is laid down by the Court, that, even after a verdict, such an omission is fatal. But it is said, that it is averred here, that the defendant carried away the tithe contrary to the form of the statute, and that that allegation is sufficient. I think that is not so. The Court are to judge whether the facts stated are contrary to the statute, and it is not to be taken after verdict that facts are proved, which not being stated in the declaration, it could not be necessary to prove at the trial. As to the general point, the import of the statute seems to me to be confined to particular tithes, and not to extend to all predial tithes. The statute, as it seems to me, excludes cases where the right to tithes originated within 40 years before or at any time after the passing of the act. Now

(a) 1 T. R. 145

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such a right may have originated since the period fixed ; for lands tithe-free may, either by agreement founded on a valuable consideration, or sanctioned by an act of parliament, have become liable to pay tithes ; those cases, however, would not fall within the words of the act. The count, therefore, ought to have contained this allegation, and not containing it, the judgment must be arrested.

BEST J. concurred.

Rule absolute. (a)

(a) Abbott C. J. was absent.

Wednesday,
July 4th.

The KING *against* The Inhabitants of ST. LAW-
RENCE, LUDLOW.

Where a pauper legally settled in the parish of *A.*, having met with a severe accident in the parish of *B.*, was carried into an adjacent parish to be cured, and remained there for a long period of time : Held, that he was to be considered as casual poor in the parish of *C.*, and was irremovable ; and that an order of removal to *A.*, suspended, under the powers

of 35 G. 3. c. 101., and a subsequent order on the overseers of *A.* to pay the intermediate charges incurred by the parish of *C.*, were invalid.

TWO justices, by their order, removed *George Thomas* from the parish of *St. Lawrence, Ludlow*, to the parish of *Leinthall Starks*, in the county of *Salop*. The sessions, on appeal, discharged the order, subject to the opinion of this Court on the following case. On the 31st of *October*, 1818, *George Thomas*, the pauper, was sent with his master's team for coals, and, on the road, in the parish of *Bromfield*, was thrown down by the horses, by which means his thigh was fractured. The accident took place about half a mile from *Ludlow*, in the parish of *Bromfield*. A person passing by with an empty waggon took the pauper to *Ludlow*, to the *Bell Inn*, which is in the parish of *St. Lawrence, Ludlow*,

where

where the pauper was taken in, and where he remained for the space of fourteen weeks, during which time he was attended by a surgeon, who reduced the fracture. The overseers of *Ludlow* came to the *Bell* the same day, and examined the pauper, and directed the mistress of the house to take care of him: they also were present when the surgeon was there. On the 4th *November*, an order of removal was made by the magistrates, removing the pauper to the parish of *Leinthall Starks*, his place of settlement. There was also an order of suspension made at the same time. On the 17th *July* following, an order for the charges incurred by *St. Lawrence, Ludlow*, was made, under the power given by the 35 G. 3. c. 101. It was objected, that, under the facts above stated, the magistrates had no power of removal, and the sessions being of that opinion, discharged the orders.

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ants of
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LUDLOW.

Pearson, in support of the order of sessions. The case of *Rex v. St. James'*, in *Bury St. Edmunds* (a), is directly in point. And no solid distinction can be taken on the ground that here the parish of *St. Lawrence, Ludlow*, was not the place where the accident happened; for wherever the pauper, in consequence of that accident, is found in an indigent state, he is to be considered as casual poor. *Lamb v. Bunce* (b). Here the pauper was to be considered as casual poor in *St. Lawrence, Ludlow*, and consequently was not removeable. For none can be removed, by 13 & 14 *Car. 2. c. 12.*, except those who are "coming to settle."

W. E. Taunton, contra. In the case of *Rex v. Birmingham* (c), the authority of *Rex v. St. James'*, in *Bury St.*

(a) 10 *East*, 25.(b) 4 *M. & S.* 277.(c) 14 *East*, 252.

Edmunds,

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ants of
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Edmunds, which was a novel decision, was somewhat shaken. There the pauper could hardly be considered as “coming to settle” in the parish of *Feckenham*, and yet the Court held that she was removable. In *Rex v. St. James’*, in *Bury St. Edmunds*, the pauper only came into the town with a temporary purpose, and meaning to return immediately. He did not, therefore, come *animo morandi*. But here the pauper did come with an intention of staying; for he came into the parish to be cured of his sickness. Suppose a person goes into a town to assist in the execution of some public work, as, for instance, the building of a church, or the like, and during his stay, becomes chargeable. Is he to be considered as irremovable, because he is not coming to settle? Surely not. The expression, “coming to settle,” is very vague and indefinite, and is sufficiently satisfied by a party coming into a town with an express intention of staying some time, or under circumstances from which such intention must necessarily be presumed.

ABBOTT C. J. I am of opinion, that in this case the sessions were right in holding that the pauper was irremovable. The case of *Rex v. St. James’*, in *Bury St. Edmunds*, seems to me to have been most correctly decided, and I do not think the present case materially distinguishable from it. But it is said, that *Rex v. Birmingham* is at variance with its authority. I am not of that opinion; but if it were necessary to decide between the two cases as conflicting authorities, I should adhere to the opinion of the Court in *Rex v. St. James’*, in *Bury St. Edmunds*. For the statute 13 & 14 Car. 2. c. 12. only gave a power of removal of those paupers who were coming to settle. Now how can it be said that this pauper was coming to settle in *St. Lawrence Ludlow*?

Nor

Nor does the 35 G. 3. c. 101. make any difference; for previously to the passing of that act, a pauper under these circumstances could not have been removed. And that act only regulated the powers of removal already existing, but did not give any new power to the magistrates for removing paupers who were irremovable before. The order of sessions is therefore right, and must be confirmed.

Order of sessions confirmed.

CHEAP and Others, Assignees of BRANDER and BARCLAY, Bankrupts, *against* CRAMOND. (a)

DECLARATION for work and labour by the bankrupts, before their bankruptcy, in drawing and making out policies of insurance, and in and about causing divers persons to insure ships and goods; and for premiums advanced, &c.; counts for money lent, money had and received, and upon an account stated. Plea, general issue. The cause was tried before *Best J.*, at the *London* sittings, before *Michaelmas* term. The bankrupts, who were merchants in *London*, recommended the defendant to consign goods to the house of *Ruxton and Co.*, at *Rio Janeiro*, for sale; the latter were to remit the proceeds to the bankrupts, who were to pay over the same to the defendant. The bankrupts, upon receiving advices from *Ruxton and Co.* that the goods were sold, advanced money to the defendant, on account, to recover which this action was brought; *Ruxton and Co.* afterwards failed without remitting the proceeds. It appeared, however, that the bankrupts and *Ruxton and Co.* divided equally the commissions on the

1821.

The King
against
The Inhabitants of
ST. LAWRENCE,
LUDLOW.

A merchant in *London* recommended consignments to a merchant abroad, and it was agreed that the commission on all sales of goods recommended by one house to the other should be equally divided, without allowing any deduction for expenses: Held, that this was a participation in profit, and constituted a partnership between the parties *quoad hoc*.

(a) This case was argued at the sittings before *Easter* term.

1821.

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CHEAP
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sale of all goods recommended by the one house to the other. Upon this it was argued, that the bankrupts were partners quoad hoc with *Ruxton* and Co., and that the receipt of the proceeds of the goods was, therefore, a receipt by the bankrupts, and the advance by them to the defendant was a payment on account, for which they were liable. The learned Judge was of that opinion, and the jury found a verdict for the defendant. A rule nisi for a new trial having been obtained in last *Michaelmas* term, on the authority of a case of *Muirhead v. Salter*, in which it was said, the Court of Common Pleas had decided that a division of commission between insurance brokers did not constitute a partnership,

Marryat and *Puller* shewed cause. It is a well established principle of law, that a participation in the profits of a trade constitutes a partnership, so as to make the parties participating in such profits liable as partners to other persons. Now here there was clearly a division of profits between the two houses, as to all consignments recommended by the one house to the other; for the commissions constituted the whole profit. *Waugh v. Carver* (a) is an authority expressly in point. There, two ship-agents at different ports entered into an agreement to share, in certain proportions, the profits of their respective commissions, and the discount on tradesmen's bills employed by them in repairing the ships consigned to them, &c.; and they were held liable, as partners, to all persons with whom either contracted as such agent; although the agreement expressly provided, that neither should be answerable for the acts or losses of the other. The case of *Muirhead v. Salter* is not reported. It does not appear that the motion

(a) 2 H. Bl. 235.

for a new trial was made, on the ground that the jury ought to have considered the division of the commissions between the insurance-brokers, as a participation of profits. The profits of an insurance-broker arise only in part from his commission; a very large proportion of his profits arises from a per centage he receives from the underwriters, upon the gross amount of the payments he makes to them.

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Scarlett and Campbell, *contra*. It may be admitted, that a participation in the profits of a trade constitutes a partnership as to third persons. It will appear, however, from all the authorities on the subject, that the participation should be in the profits. In *Ex parte Hamper* (a), Lord Eldon lays it down, that if a trader agrees to pay another person, for his labour in a concern, a sum of money even in proportion to the profits equal to a certain share, that will not make him a partner. In *Bloxham v. Pell* (b), the outgoing partner was to have, besides interest for his capital, an annuity of 200*l.* for six years, *as in lieu of the profits of the trade*, and in *Grace v. Smith* (c), De Grey C. J., speaking of money left behind in trade by a retiring partner, says, "The true criterion is, to enquire whether the retiring partner agreed to *share the profits* with the remaining partner, or whether he only relied on those profits as a fund of payment." In the case too of *Waugh v. Carver* (d), the agreement was, in effect, for a share of the profits; for it was expressly stipulated in that case, that one-fifth part of the commission on each ship should be retained, as a full compensation for clerks, and other incidental charges and expences, after

(a) 17 *Ves.* 404.(b) Cited in *Grace v. Smith*.(c) 2 *Sir W. Black.* 998.(d) 2 *H. Bl.* 235.

which

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which deductions, the then remaining balance of commission should be divided. In that case, the gross proceeds were the entire commissions received. The expenses of carrying on the business were estimated at a sum equal to one-fifth of the commissions generally earned. The residue was clear profit, and it was that profit which the parties were to share. There, likewise, there was a participation in the profit arising from the discount on tradesmen's bills and other dealings of the two houses. But in this case, the parties were to share the gross proceeds of the business, and not the profits, for, as factors, they had to pay the expenses of clerks, of warehouses, &c. The commission was the source only from which the profits were to arise. The profit is the surplus which remains, after deducting all expenses. In *Dixon v. Cooper* (a) it was held, that a factor who sold for the plaintiff, and was to have one shilling in the pound upon the sale, was a good witness to prove the contract; and in *Benjamin v. Porteus* (b), a person employed to sell goods, and who was to have for himself whatever money he could procure for them beyond a stated sum, was held to be a competent witness to prove the contract between the seller and buyer. According to the argument on the other side, in both these cases, the broker participated in the profit, and was, therefore, a partner, and, consequently, was interested, and if so, not a competent witness. The proposition contended for on the part of the defendant goes to this extent, that if a party, with or without consideration, gives to another a share in commissions, he makes the donee a partner: and so it would be the case with every person who is paid for his trouble by a per centage; and

(a) 3 Wils. 40.

(b) 2 H. Bl. 590.

thus

thus, ship-brokers who are paid in that mode by a per centage on the freight, or surveyors, who are paid by a per centage on the tradesmen's bills, might be considered partners. In *Muirhead v. Salter* (c), the Court of Common Pleas held, that a division of the commissions on effecting particular policies between insurance-brokers, did not constitute a partnership. That case was tried before the late Lord C. J. *Gibbs*, who told the jury, that the division of the commissions did constitute a partnership. They found, however, against his direction, and that great Judge, with his brethren, afterwards thought, that the jury were right, and refused to disturb their verdict.

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Cur. adv. vult.

The judgment of the Court was delivered in the course of this term by

ABBOTT C. J. This cause was tried at *Guildhall*, before my brother *Best*, and a verdict under his direction found for the defendant. A motion was afterwards made for a new trial, and a rule to shew cause having been granted; the case was very elaborately argued before us at this place, before last *Easter* term. The real question in the cause is, whether the bankrupts, who were merchants in *London*, are to be considered as partners with the house of *Ruxton*, at *Rio Janeiro*, with reference to the transaction in question. The action is for money had and received to the use of the bankrupts. The facts are these. The defendant having occasion to send goods to *Rio Janeiro*, for sale there, applied to the bankrupts for recommendation to a house at that place; they recommended *Ruxton*, and the goods were con-

(a) Not reported.

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signed to him. *Rurton* was to remit the proceeds in money or goods, to the bankrupts, who were to pay over the money to the defendant, or sell the goods, and account to him for the proceeds. The correspondence was carried on between the bankrupts and *Rurton*, the defendant not communicating directly with *Rurton*. The latter sold the goods, and having advised the bankrupts thereof, they advanced a sum of money to the defendant in anticipation of the remittance expected from *Rurton*, and the latter having failed, and made no remittance, this action was brought to recover the money so advanced. And if there had been nothing more in the case, the plaintiffs had an undoubted right to recover. But it came out at the trial, that the bankrupts and *Rurton* were in the habit of dividing equally the commissions received by each other on the sales of all goods recommended, or "influenced" according to the expression of the witnesses, by the one house to the other; and according to this habit and course of dealing, the bankrupts were entitled to half the commission received by *Rurton*, on the sale of the defendant's goods, and he would be entitled to one-half of the commission, if any, charged by them, on their receipt of the proceeds in *London*, had the proceeds been duly remitted. And upon this evidence, it was contended on the part of the defendant, that the bankrupts were to be considered as joint factors, or partners, quoad hoc, with *Rurton*; and consequently that his receipt was in effect a receipt by them, and so the advance of the money by them to the defendant was, in effect, merely a payment of money for which they were previously accountable to him. And in support of this proposition, the case of *Waugh v. Carver* (a),

(a) 2 H. Bl. 235.

was cited and relied on. And we are all of opinion, that the present case cannot be distinguished in principle from that, and that our decision must be governed by it. It is true, that in that case a definite part of the commission was, by agreement of the parties, to be deducted as compensation for the charges and expences before a division took place; and also that each party was to share in some specified measure with the other, in other parts of the profits of their respective business, such as warehouse rent, and discount upon tradesmen's bills. And it was contended, in this case, on the part of the plaintiffs, that the bankrupts and *Ruxton* were to be considered as dividing the gross proceeds only, and not the net proceeds or profits of each other's agency or factorage; and that a division of gross proceeds does not constitute a partnership. We think, however, that the previous deduction of a definite part of the commission before the division in the case cited, is an unimportant fact. It cannot have the effect in all cases of leaving the remainder as clear profit, because the expence and charge cannot be in all cases uniformly the same, but must vary with the particular circumstances of each transaction; so that in effect a part only of the gross commission, or proceeds of the agency, and not the whole, was to be divided in that case; and taking the definite deducted part at a fifth, or any other aliquot part, the absent house, instead of receiving one-half, as in the case at bar, would, by the agreement, receive two fifths, or some other definite part of the whole gross sum, and not an indefinite part thereof, depending upon the actual and clear profit of the transaction. And although, in the case of *Waugh v. Carver*, the agreement was not confined to a division of the commission, but extended also to the monies received in certain other parts of the transactions of the

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two houses, yet the principle of the decision is not affected by that circumstance, the principle being, that where two houses agree that each shall share with the other the money received in a certain part of the business, they are, as to such part, partners with regard to those who deal with them therein, though they may not be partners inter se. By the effect of such an agreement, each house receives from the other a part of that fund on which the creditors of the other rely for payment of their demands, according to the language of Lord Chief Justice *De Grey*, in the case of *Grace v. Smith* (a). And such an agreement is perfectly distinct from the cases put in the argument before us, of remuneration made to a traveller, or other clerk or agent, by a portion of the sums received by or for his master or principal in lieu of a fixed salary, which is only a mode of payment adopted to increase or secure exertion. It is distinct also from the case of a factor receiving for his commission a per centage on the amount of the price of the goods sold by him, instead of a certain sum proportioned to the quantity of the goods sold, as was the case of *Dixon v. Cooper* (b), wherein it was held, that the factor was a competent witness to prove the sale. It differs also from the case of a person receiving from a trader an agreed sum, in respect of goods sold by his recommendation, as one shilling per chaldron on coals, or the like, for there there is no mutuality, and such a case resembles a payment made to an agent for procuring orders, and has no distinct reference in the terms of the agreement to any particular coals purchased by the coal-merchant for resale upon which a third person may become a creditor of the coal-merchant, and probably

(a) 2 Sir W. Black. 998.

(b) 3 Wils. 40.

could

could not in any instance be shewn to apply in its execution to any such particular purchase. But it is to be observed, that, even on a case of this nature, the inclination of *Lord Mansfield's* opinion, in *Young v. Artell*, (cited 2 *Hen. Bla.* 242.) was that such an agreement might constitute a partnership. Of the case of *Muirhead v. Salter*, referred to in the argument, we have neither the facts nor the ground of decision brought before us with sufficient accuracy, to enable us to consider it as an authority on the present question. It may have been, that the division of the commission between the two insurance brokers was a solitary instance; that the assured had recognized the second broker, as being the person employed by himself; or that the Court did not think fit, under all the circumstances of the particular case, to disturb the verdict of a jury of merchants, as to the effect of a division of the commission in that particular species of agency, the divided commission being, as I understand, payable for effecting the policy, and not for receiving the money from the underwriters, in the event of the loss, and payable whether any loss had occurred or not. So that we cannot consider that case as having contravened or weakened the authority of the decision in *Waugh v. Carver*. Upon the authority of this latter case, and for the reasons already given, we think the direction of the learned judge at the trial, and the verdict of the jury, are right, and that the rule for a new trial ought to be discharged. But as it has been strongly urged, that our decision in the present case will be of most extensive consequence upon foreign commerce, although we are by no means convinced that such is really the fact, we will allow the rule to be drawn up, to set aside the verdict, and enter a nonsuit, if the plaintiffs desire it, in order to afford

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Rule discharged.

Thursday,
July 5th.

DOE, on the Demise of LEWIS and Others,
against BINGHAM.

By deed a mortgagee conveyed to the mortgagor the legal estate, upon being paid the mortgage-money, and the latter reconveyed it to trustees for the purpose of securing an annuity. At the time of the execution by the mortgagee, there were several blanks in the deed, but not in that part which affected him. The blanks left were for the sums to be received by the mortgagor from the grantees of the annuity, and were all filled up at the time of the execution of the deed by the mortgagor; but several interlineations were made in that part of the deed, after the execution by the mortgagee. It was held, that the deed was not therefore void, but operated as a good conveyance of the estate from the mortgagor to the trustees for the payment of the annuity.

EJECTMENT upon two demises. First, of *Lewis*, secondly, of *Boston* and *Kilvington*. Plea, not guilty. The cause was tried at the *Hants'* Summer assizes, 1820, before *Graham B.* The defendant was a beneficed clergyman, and the premises in question were his glebe, upon which, until *December*, 1815, one *Richard Lassam* had been the mortgagee. In order to prove the plaintiff's case, a deed, bearing date 23d *December*, 1815, was produced, which appeared, by the certificate of the proper officer indorsed thereon, to have been enrolled, but no enrolment was produced. The deed was in five parts; the defendant of the first part, *Thomas Woodham* and *John Dunn* of the second part, *Richard Lassam* of the third part, *James Boston* and *James Kilvington* of the fourth part, and *Benjamin Lewis* of the fifth part. The general object of the deed was to discharge the premises of a mortgage to *Lassam's* trustees, who were *Woodham* and *Dunn*, and to vest the legal estate in *Lewis*, as the trustee of *Boston* and *Kilvington* (who had advanced 3000*l.* to the defendant) as a security for the payment of an annuity of 450*l.* to

Held, also, that it was not incumbent on the plaintiff in ejectment brought on this deed, to prove that the annuity was duly enrolled.

Held, also, that the tenant in possession was not competent to prove that the witness, and not the defendant, was the possessor of the land.

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the latter, during the defendant's life and incumbency. It was proved, that this deed was executed by *Lassam* and his two trustees, on the 21st of *December*, and *Lassam* thereby acknowledged the receipt of his mortgage-money, and he and his trustees surrendered their legal estate in the premises; and then *Bingham* conveyed the fee to *Lewis*, the trustee of *Boston* and *Kilvington*. At the time of the execution of the deed by *Lassam* and his trustees, there were several blanks left in it, but there were none in that part of it which related to *Lassam's* mortgage. The blanks left were for the sums to be received and paid by the defendant, and several interlineations were also made in that part of the deed, after *Lassam* and his trustees had executed the deed. The execution by *Bingham* took place on the 23d *December*, 1815, at which time the blanks were all filled up. It was objected by the defendant at the trial, first, that these alterations and interlineations avoided the deed in toto, and consequently, that the lessors of the plaintiff, who claimed under it, had not the legal estate in them; and, secondly, that it was necessary for the plaintiff, not only to produce the deed, but also to produce the enrolment of it, as required by the annuity act. Both these objections were over-ruled. The defendant further tendered his daughter as a witness, to prove, that she was tenant in possession of the premises. The learned Judge rejected her testimony. A rule nisi for a new trial having been obtained in last *Michaelmas* term upon the objections taken at the trial,

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Pell Serjt. and *A. Moore* now shewed cause. This deed was complete, as a conveyance to the lessor of the plaintiff, at the time when the defendant executed it. It

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operated differently as to the mortgagee and the defendant, viz. as to the mortgagee, as a surrender of his interest, and as to the defendant, as a conveyance of the legal estate to the lessors of the plaintiff. The interest of the mortgagee was not affected by the alterations, and therefore the alterations were, as to him, immaterial. Besides, the defendant is estopped, by his executing the deed, from saying that it is different from what it purports to be. It was not necessary for the plaintiff, in this case, to prove the enrolment of the annuity. If the defendant meant to insist that the deed was void, in consequence of some defect in the memorial, it was for him to substantiate that by proof. *Doe v. Mason (a)* is an authority expressly in point.

Scarlett, Chitty, and R. Scarlett, contra. The plaintiff is to recover on the strength of his own title, and in this case insists, that the person having the legal estate, had conveyed that to him by executing a deed; that deed is entire, relating to one subject matter, viz. the securing of the annuity. If it is bad in part, it is bad in the whole. *Pigott's case (b)* is an authority to shew, that where any deed is altered in a part material, even by a stranger, whether it be by interlineation, addition, rasing, or by drawing a pen through the midst of any material word, it becomes void; and 2 *Roll's Abr.* 29. *pl.* 29 is a strong authority to the same effect. In *Denn v. Dollman (c)*, *A.* being entitled to a life-estate, subject to a condition not to charge or incumber it, granted an annuity, and demised the land as a security; but there being a defect in the memorial of

(a) 5 *Campb.* 7.(b) 11 *Rep.* 26.(c) 5 *T. R.* 641.

the annuity, the Court held, that the whole deed was void to all intents and purposes, even though the other parts of it were not connected with the annuity. That case is an authority expressly in point. Secondly, it was incumbent on the plaintiff to shew, that the annuity was duly enrolled, for his title depends upon it. In the case of a bargain and sale by deed enrolled, it is not enough to put in and prove the deed, but it is also necessary to produce and prove the enrolment; and that is an analogous case to the present. As to the third point, the witness ought to have been received, for her testimony would subject her to the ejectment, and to the action for mesne profits. It was not, therefore, her interest to prove herself tenant in possession.

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BAYLEY J. It seems to me that this deed, notwithstanding the interlineations, and the filling up of the blanks subsequently to its execution by *Lassam*, was still valid, so as to convey the property from the defendant to the lessors of the plaintiff. The whole deed may be considered as one entire transaction, operating, as to the different parties to it, from the time of the execution by each, but not perfect till the execution by all the conveying parties. I am of opinion, that any alteration made in the progress of such a transaction, still leaves the deed valid as to the parties previously executing it, provided such alteration has not affected the situation in which they stood. In this case, it appears, that there had been upon the property a mortgage to *Lassam*, for a term of years, for 1000*l.* *Boston* and *Kilvington*, two of the lessors of the plaintiff, agreed to advance *Bingham* 3000*l.*, he granting them an annuity of 450*l.* per annum; now in order to make this security valid, it was

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necessary that there should be a conveyance from *Lassam* of his interest, and the form in which that was effected, was, by taking a conveyance in fee from *Bingham*, and a surrender from *Lassam* of his interest. The deed therefore as to *Lassam* and *Bingham*, operates in a different manner. As to the former, it extinguishes his term, and by so doing, vests the fee in *Bingham*. Then it is that the deed is proposed to *Bingham* to be executed, and before he executed it, the alterations in question were made. Now at that time the deed was not perfect in all its parts. As against *Lassam* it was complete. But with respect to the other parties, it was in progress only, and the alterations made were only for the purpose of rendering it conformable to their wishes. There is no authority which says, (and it would be contrary to common sense, if there were one,) that an alteration so made and not operating upon the provisions of the deed, relating to the parties who had previously executed it, should avoid it. Here the alterations do not in any respect touch the part of the deed affecting *Lassam*. As to him, therefore, they are alterations made in an immaterial part of the deed, and being made whilst the deed was in progress, our decision does not clash with any of the authorities cited. I think, therefore, that the deed was valid. As to the second objection, that the enrolment of the memorial was not produced, I am of opinion that such production was not necessary. It was sufficient for the lessors of the plaintiff to produce the deed, and it lay on the party relying on the want of the enrolment, to shew that it had not been enrolled. It is like the case of a proviso in an act of parliament, in which it is a settled rule, that the party wishing to avail himself of it, must bring himself within it. As to
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the third point, it is clear that Miss *Bingham* was not a witness. The case of *Doe v. Wilde* (a), is exactly in point. The rule, therefore, must be discharged.

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HOLROYD J. As to the last point, I am entirely of the same opinion, and shall add nothing to what has fallen from my brother *Bayley*. I am also of opinion, that the deed having been executed by *Lassam* and his trustees, was complete as to them. The subsequent alteration did not, at all events, re-vest the term in them. For even the cancelling of a deed does not re-vest the property conveyed. That appears from the case of *Bolton v. the Bishop of Carlisle* (b), and the same principle is to be collected from *Roe dem. Lord Berkeley v. the Archbishop of York* (c). Those cases shew that even the destruction of a deed does not re-vest the rights conveyed by it. *Lassam*, therefore, and his trustees, by the execution of the deed, extinguished the term; and the deed, therefore, remains a valid deed as to *Bingham*. With respect to the other point, I am of opinion, that the onus probandi lies upon the party seeking to avoid the deed, by want of enrolment; and *Doe v. Mason* (d) is an authority in point. The case of a bargain and sale is distinguishable; for a bargain and sale do not operate at common law, but by statute, if enrolled. It is, therefore, in that case, necessary to prove the enrolment; for there it is part of the title.

BEST J. I am of the same opinion. The deed of the mortgagee was in this case complete before the blanks were filled up in the other parts of the deed, and

(a) 5 Taunt. 183.

(b) 2 H. Bl. 263.

(c) 6 East, 86.

(d) 3 Campb. 7.

if

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FERRIS *against* BOND.Friday,
July 6th.

THIS action was brought upon the following instrument. “ I, *John Corner*, promise to pay to *Absalom Ferris* the sum of 50*l.*, with lawful interest for the same, or his order, at six months’ notice. Dated this 24th June, 1808. *John Corner*, or else *Henry Bond*.” The first count of the declaration treated this instrument as an agreement. The second count, as a promissory note. At the trial, before *Burrough J.*, at the last assizes for the county of *Somerset*, it was objected, that it had no agreement stamp, and therefore could not be received in evidence as such; and secondly, that it was not a promissory note within the statute of *Anne*, as the defendant was only to become liable on the contingency of non-payment by *Corner*. The learned Judge directed the jury to find a verdict for the plaintiff on the second count, but reserved liberty to the defendant to move to enter a nonsuit. A rule nisi was accordingly obtained by *Gaselee*, in last *Easter* term, and he cited *Blankenhagen v. Blundell* (a), where it was held, that a note, whereby the maker promised to pay to *A.* or *B.* and *C.* a sum therein specified, value received, was not a promissory note within the statute of *Anne*. The only distinction between the two was, that there, the payee was uncertain, here, the payer is uncertain.

Where a note stated that *I. S.* promised to pay to *A. B.*, or order, a certain sum, and was signed *I. S.*, or else *I. G.* : Held, that this was not a promissory note by *I. G.* within the statute of *Anne*.

Pell Serjt. and *Bayly* now shewed cause. This does not differ, substantially, from a several promissory note.

(a) 2 B. & A. 417.

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If every one severally promises to pay, it amounts to nothing more, in fact, than a promise by each to pay, if the others do not, for a payment of one discharges all the rest. All, it is true, promise to pay at the same time, but in this instance the defendant promises to pay at six months' notice, and if so, he is to pay at the very same time as *Corner*, in case *Corner* make default. The words of this instrument, therefore, carry it no further than the common case, where neither is liable to pay on the day, unless the other does not, and where no action will lie against any one till after the day when either may be sued. This is, therefore, merely a several promissory note, for "else" means nothing more than "or." If, indeed, there be any difference between this instrument and any other several promissory note, it is, that this is, in its terms, more certain; for in a several promissory note, the holder may call on either first; but, according to this note, he is first to call upon *Corner*. In *Wilkinson v. Lutwidge* (a), a question arose, whether, under the circumstances, there was an acceptance of the bill by letter, which was in these terms: "The two bills of exchange which you sent me, I will pay, in case the owners of the *Queen Anne* do not, and they living in *Dublin*, I must first apply to them. I hope to have an answer in a week or ten days. I do not expect they will pay them, but I judge it proper to take their answer before I do; which I request you will acquaint Mr. *Wilkinson* with, and that he may rest satisfied of the payment." It was objected, that this did not amount to an acceptance, but only a condition to pay in case the owners of the *Queen Anne* did not; but it was held to

(a) 1 Str. 648.

be a good acceptance, because it amounted to a promise that the plaintiff should have the money at all events.

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Per Curiam. This is not a promissory note by this defendant within the statute of *Anne*. It operates differently as to the two parties. It is an absolute undertaking on the part of *Corner* to pay, and it is conditional only on the part of the defendant, for he undertakes to pay only in the event of *Corner's* not paying. The rule for entering a nonsuit must be made absolute.

Rule absolute.

The KING *against* The Inhabitants of
ST. MARY-LE-BONE.

Saturday,
July 7th.

TWO justices, by their order, removed *Michael Hoyden* from the parish of *St. Mary-le-bone*, in the county of *Middlesex*, to the parish of *St. Pancras*, in the same county. The sessions, on appeal, discharged the order, subject to the opinion of this Court upon the following case. The pauper hired an unfurnished shop in the parish of *St. Pancras*, of the yearly value of 10*l.* and upwards, and lived therein eight months. He afterwards hired an unfurnished shop and parlour, part of a house in the parish of *St. Mary-le-bone*, at the rent of 26*l.* a year, which he took possession of on the 25th *May*, 1819, and resided in and occupied the said last-mentioned premises upwards of 40 days, but only 38 days of such residence and occupancy had elapsed on the 2d day of *July*, 1819, the day on which the 59 G. 3.

A pauper does not gain a settlement by having hired a tenement of more than 10*l.* a-year value, and having resided therein more than 40 days altogether, but less than 40 days before the passing of the 59 G. 3. c. 50., by which a residence for twelve months is necessary, in order to confer a settlement.

c. 50.

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c. 50. received the royal assent. The sessions were of opinion, that, by this residence, the pauper gained a settlement in *St. Mary-le-bone*, and discharged the order.

Scarlett and *Adolphus*, in support of the order of sessions. The settlement being in progress to be acquired at the time when the 59 G. 3. c. 50. received the royal assent, must be governed by the law as it existed before the passing of that act. All the words of the act are future, and there is no clause affecting settlements already in progress. The principle to be found in the case of *Ashburnham v. Bradshaw* (a) is in point. There a devise to charitable uses was made, by a will, dated in 1734. The testator lived till *July*, 1736, a month after the mortmain act had passed, and upon a case, the Judges certified that the devise was good; and the *Attorney-General v. Lloyd* (b), and *Same v. Andrews* (c) are to the same effect. So, in *Gillmore v. Shuter* (d), where a parol agreement had been made previously to the statute of frauds, and the action was brought subsequently, it was held not to be within the 4th section; and the Court there put the case of a will executed without the formalities required, which they said would be valid, if made before the act, although the testator survived the passing of the act. These cases seem analogous to the present, and shew that the whole transaction must be subsequent to the passing of the act. Here, the settlement was in progress at that time.

(a) 2 At. 36.

(b) 3 Atk. 551.

(c) 1 Ves. sen. 225.

(d) 2 Lev. 227.

Nolan,

Nolan, contra, contended, that, as the pauper had resided only 38 days at the time of the passing of the 59 G. 3. c. 50., the settlement not being complete under the old law, must be regulated by that act, and then a residence of twelve months upon the tenement is necessary to confer a settlement.

1821.

The KING
against
The Inhabit-
ants of
ST. MARY-LE-
BONE.

Cur. adv. vult.

And now (absente *Abbott* C. J.) the judgment of the Court was delivered by

BAYLEY J. The question, in this case, turns entirely upon the construction of the statute 59 G. 3. c. 50., which took effect from the second of *July*, 1819. The pauper had, on that day, resided in and occupied, for a period of thirty-eight days, part of a dwelling-house in *Mary-le-bone* parish, at 26*l.* a-year; so that, if the statute had not been passed, he would undoubtedly have acquired a settlement in *Mary-le-bone* by his subsequent residence and occupation, which, in the whole, considerably exceeded forty days. But he had not, on the second of *July*, acquired such settlement. It was contended, that the statute being wholly expressed in the future tense did not apply to such a case, but must be considered as wholly and absolutely prospective, and confined to tenements hired after the day on which the statute took effect. If this be the true construction, then a residence of one day prior to the statute, connected with a continued residence in pursuance of the original hiring for thirty-nine days after the statute, will confer a settlement. The statute, however, had in view, as appears by the preamble, the preventing of the disputes and controversies which had
arisen

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arisen respecting the settlement of poor people by the renting of tenements. And we think this object will be best attained by giving to the words of the enacting part their full and absolute effect, and by considering the statute as applicable to every case within its scope, wherein a previous settlement had not been completely gained and established before the statute was passed. A contrary construction might open the door to many disputes and controversies as to the nature and effect of of inchoate titles. Whereas, according to the construction which we adopt, the only enquiry hereafter will be, whether a settlement had been acquired before the 2d *July*, and the case will be considered as if the pauper had died or removed from the tenement on the first day of that month, and as if he had resided *on*, but not *after* that first day of *July*.

Order of Sessions quashed and
 original order confirmed.

Tuesday,
July 10th.

DOE, dem. HULL, against GREENHILL.

A trust created by a defendant in favour of himself and another person, is not a trust within 29 *Car. 2. c. 3. s. 10.*, that clause being confined to cases where the trustees are seised or possessed in trust for a defendant alone, and not jointly with another person.

THIS was an ejectment, tried before *Abbott C. J.*, at the *Middlesex* sittings after last *Michaelmas* term, when a verdict was found for the lessor of the plaintiff, who claimed under a judgment recovered against the defendant, and a writ of *elegit* and inquisition thereon, taken and returned; but liberty was reserved to the defendant to move to enter a nonsuit, upon an objection taken at the trial. The objection was, that, by a deed, executed 23d *June*, 1809, long before the plaintiff's judgment was recovered, the legal estate in

in the premises was vested in trustees, for the purpose of securing an annuity to the defendant's mother. (a) By the deed, the trustees were empowered to enter, in case the annuity was in arrear; which they did in 1817. But, at the time of the execution of the elegit, and of commencing the present action, there was nothing in arrear. It was contended, for the plaintiffs, that the case fell within the 29 *Car. 2. c. 3. s. 10.*, as being premises held in trust for the defendant. A rule nisi having been obtained by *Scarlett*, in last *Hilary* term, for entering a nonsuit,

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DOX, dem.
HULL,
against
GREENHILL.

Marryat and *Archbold* now shewed cause. By the 29 *Car. 2. c. 3. s. 10.* it is enacted, "That it shall be lawful for every sheriff, to whom any writ shall be directed, at the suit of any person, upon any judgment, statute, or recognizance, to deliver execution of all such lands, tenements, rectories, &c., as any other person be in any manner or wise seised or possessed, in trust for him against whom execution is so sued, like as the sheriff or other officer might or ought to have done, if the said party against whom execution is sued, had been seised of such lands, &c. of such estate, as they be seised of in trust for him at the time of the execution sued." Now here the term is held by the trustee, for the purpose of securing Mrs. *Greenhill's* annuity, and he is to be at liberty to enter and take possession, from time to time, as arrears may arise, but subject to this, the premises are held in trust for *Greenhill*, the defendant. Suppose the defendant had desired to be put into pos-

(a) The trusts of the deed are so fully stated in the judgment, that they are here omitted.

1821.

Dor, dem.
HULL,
against
GREENHILL.

session, the trustees could not have refused to do it, the annuity not being in arrear. And if they had refused, he might have brought an ejectment against them. Here the inquisition finds that the property is subject to the annuity, which the judgment creditor does not seek to disturb. Under the statute, the term, being vested in the trustees in trust for the defendant, may be taken under the *elegit*, and it is only so far as it is in trust for the defendant, that the judgment creditor is entitled to it. For if the annuity be in arrear, the trustees may again eject the creditor. The effect of the statute is, to remove the term out of the way of the lessor of the plaintiff, which otherwise would prevent him from recovering. The statute expressly states, that a trust may be taken under an execution. Now it may be either a trust created by a third person in favour of the defendant, or one created by the defendant himself, either in his own favour, or in favour of himself and some other person jointly. The test as to the first class is this: divest the case of the trust, and consider it as a legal estate, and if in that case it would be extendible, it will be, when a trust estate, within the statute. Now, if here it had been a conveyance by a third person to Mrs. *Greenhill* and the defendant, of a legal estate, either as tenants in common, or joint tenants, the interest of the defendant would be extendible. If so, a trust of that sort would be within the statute. As to the second class, a conveyance to others in trust for the person conveying alone, was always void, as being a voluntary conveyance, and so could not require the assistance of the statute to render it capable of being taken under an *elegit*. That, however, could not be the trust contemplated by Lord *Hale*, the framer of the statute of frauds.

frauds. He must, therefore, have contemplated a trust, if created by a defendant himself, not solely in favour of himself, but of himself jointly with some other person, which is the trust in this case. This, therefore, is a case falling within the statute.

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—
Dor, dem.
HULL,
against
GREENHILL.

Scarlett and Hutchinson, contra, contended, that supposing the argument correct, as urged on the other side, that a trust created by a man in his own favour was altogether void, then it followed, that in this case the trust, as to the defendant, was void; and then the premises, in point of law, were held in trust for Mrs. *Greenhill* alone. But if not, then the true construction of the statute was to confine it to cases of trusts held solely for the benefit of the defendant, which this was not.

Cur. adv. vult.

And now, on this day, the judgment of the Court was delivered by

ABBOTT C. J. We have considered of this case, and are of opinion, that the rule must be made absolute. The ejectment was brought on a judgment recovered by the lessor of the plaintiff against the defendant, and a writ of elegit and inquisition thereon taken and returned. It was brought for the recovery of a moiety of some chambers in *Lincoln's Inn*. Mr. *Greenhill* defended as landlord. The question at the trial, and afterwards before the Court, arose upon the effect of a deed executed by the defendant and his mother, Mrs. *Greenhill*, some considerable time before the plaintiff's judgment against him, for the purpose of securing to her an annuity for

1821.

—
Dor, dem.
HULL,
against
GREENHILL.

her life, to be issuing out of the premises in question, inter alia, in lieu of her dower. The deed recited, that *James Greenhill* was, at the time of his decease, seised in fee-simple in possession of the freehold chambers, the subject of this action, and of other freehold and copyhold property; the whole of which property was liable to the right of dower and free bench of *Mary Greenhill*, his widow; and that, on the decease of *James Greenhill*, the whole of the said estates became vested in the defendant, *Edward Greenhill*, his son and heir at law, subject to the said right of dower; and that it had been agreed between the defendant and *Mary Greenhill*, that the defendant should secure to her an annuity or rent-charge of 88*l.* during her life, to be payable out of the said chambers; and that, in consideration thereof, *Mary Greenhill* should release her right to dower and free bench in all the freehold and copyhold hereditaments. The deed then proceeded to state, that *Edward Greenhill* and *Mary Greenhill* bargained and sold, &c. unto *P. B. Coates*, the chambers, with their appurtenances, habendum to him, to the use, intent, and purpose, that *Mary Greenhill* might, during her life, receive one annual rent-charge or yearly sum of 88*l.*, which was to be in full satisfaction of her right to dower or free bench, with power of distress, &c., to the use of *Coates*, for 99 years, without impeachment of waste, and upon the trusts therein mentioned; and from and after the end and expiration, or sooner determination of the term of 99 years, to the use of *Edward Greenhill*, his heirs and assigns for ever; and as to the term of 99 years, upon the following trusts: first, to permit *Edward Greenhill* to receive and take the rents and profits, until default made in the payment of the rent-charge, or until

E. Green-

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 Dor, dem.
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 against
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E. Greenhill should neglect to insure the premises, and upon further trust, that in case the rent-charge should be in arrear for the space of 40 days, that it should be lawful for *Coates* to enter upon the said chambers, and to receive the rents thereof, and out of the same, or by mortgage or sale of the chambers, &c., for all or any part of the said term of 99 years; or by bringing actions against the tenants of the premises, for the recovery of rents in arrear, or by making entry upon the premises, to levy, raise, and pay all such arrears of the rent-charge, with all costs, &c.; and upon further trust, that in case the defendant should at any time neglect to insure the premises, it should be lawful for *Coates* to levy money sufficient to pay the premium to insure the premises, and to apply the same accordingly; and to permit the said *E. Greenhill*, as to the residue, to receive the rents and profits. There then followed a proviso, that, upon the death of *Mary Greenhill*, and payment of the arrears of the rent-charge, the term should cease and determine. The personal representative of *Coates*, the termor, had recovered the premises by ejectment some time ago, the annuity being then in arrear; the arrears had been discharged, and the annuity afterwards kept down, Mrs. G. receiving money for the latter purpose, from time to time, from the tenants of the premises; and nothing was due to her at the time of the execution of the elegit, or of the commencement of the present action. For the plaintiff, it was contended, that, under these circumstances, the term must be considered as a trust for the defendant, within the operation of the tenth section of the statute of frauds, and that the premises were liable to the execution by elegit, under the provisions of that statute, and might, after such exe-

1821.

DOB, dem.
HULL,
against
GREENHILL.

cution, be recovered by ejectment. For the defendant, it was insisted, that the term was a bar to the ejectment: that this was not a trust within that statute; and, supposing it to be, and that the premises might be subject to the elegit, yet that the possession thereof could not be recovered by ejectment out of the hands of the trustee, who had the legal title for the term. It is unnecessary to give any opinion upon the latter point; because we are all of opinion, that this case does not present a trust within the intent and meaning of the statute. The words of the statute are, "seised or possessed, in trust for him against whom execution is sued, like as the sheriff might and ought to do, if that person were seised." This statute made a change in the common law, and, up to a certain extent at least, made a trust the subject of enquiry and cognizance in a legal proceeding. We think the trust that is to be thus treated, must be a clear and simple trust, for the benefit of the debtor; the object of the statute appearing to us to be, merely to remove the technical objection arising from the interest in land being legally vested in another person, where it is so vested for the benefit of the debtor. It is obvious, that the term of years, in the present case, was not created for the benefit of Mr. *Greenhill*, the debtor, but for the benefit and security of his mother, Mrs. *Greenhill*; she is the principal object of the trust. And, though it be true that the term is declared to be in trust for him, until default be made in the payment of the annuity, yet such a default had, in fact, occurred, whereby, according to the declaration of trust contained in the deed, the trust for him had ceased for a time at least; and possession had been actually recovered, by a proceeding at law, for the

the benefit of his mother, who had continued to receive the annuity from the tenants in virtue of that recovery; so that the case is more adverse to the lessor of the plaintiff than it might have been, if no default had been made by the defendant, nor recovery had against him, for the benefit of his mother. And it would be quite an anomaly in the law to allow one person to recover a possession of land, liable to be defeated and divested at the suit of another, claiming under a title created before the time of such recovery, and actually existing, and shewn to the Court at that very time. We abstain from saying any thing as to any other remedy that the lessor of the plaintiff may be supposed to have in the present case. It is sufficient for us, and for the purpose of the present cause, to say, that, in our opinion, under the facts proved at the trial, the term was not held in trust for the defendant, within the meaning and intent of the statute of frauds. The present rule, therefore, must be made absolute, and the postea be delivered to the defendant.

1821.

DOE, dem.
HULL,
against
GREENMILL.

Rule absolute.

JACKSON *against* DAVISON.

Saturday,
July 7th.

A RULE nisi had been obtained for setting aside the warrant of attorney, and the judgment entered up thereon in this case, and for discharging the defendant

An insolvent debtor having petitioned the insolvent court to be discharged under the

act, a creditor gave notice of his intention to oppose him, on the ground that the debt was fraudulently contracted. To induce the latter to withdraw his opposition, the insolvent agreed to execute, within three days after his discharge, a warrant of attorney for the debt, and, in the mean time, to give a promissory note of a third person for the amount, which was to be delivered up on the execution of the warrant of attorney. The insolvent was discharged, and the warrant of attorney was executed on the delivery up of the note. The Court set aside the warrant of attorney, and the judgment entered up thereon, on the ground that the agreement on which they were founded was contrary to the policy of the insolvent act, inasmuch as it enabled the creditor to take to himself a large portion of the future effects, which the legislature intended to be distributed amongst all the creditors.

1821.

 JACKSON
 against
 DAVISON,

out of the custody of the marshal. It appeared upon the affidavits, that the defendant, in *November*, 1820, was discharged under the insolvent act, the 1 *Geo. 4. c. 119*. The plaintiff, on that occasion, was an opposing creditor for a debt of 1200*l.*, which was principally for money lent, for the purpose of enabling the defendant to remove an execution out of his dwelling-house, and as a security, he gave the plaintiff a bill of sale of all his household goods. Notwithstanding this, the defendant fraudulently removed his goods from the premises under a collusive execution. On these grounds the plaintiff gave notice of his intention to oppose the defendant's discharge. In order to induce the plaintiff to withdraw the opposition, the defendant agreed to secure the debt by a warrant of attorney, to be executed within three days *after* the defendant's discharge, and in the mean time, by a promissory note of a friend, payable on demand, the plaintiff undertaking to deliver up such notes, on the defendant's executing the warrant of attorney. In pursuance of such agreement, the note was given and cancelled on the execution of the warrant of attorney, and the first instalment having become due, the plaintiff had entered up judgment and sued out execution.

Scarlett and *Pollock* now shewed cause. 'The plaintiff in this case might, by opposing the defendant's discharge, have caused him to suffer two years' imprisonment, under 1 *Geo. 4. c. 119. sec. 18*. That provision was introduced for the benefit of the creditor, and it is competent to a man to renounce a provision of an act of parliament which is in his own favour. Here the warrant of attorney was not given until *after* the defendant's discharge; it therefore created a new debt. [*Bayley J.*

Was

Was it not a debt “occasioned” before the discharge?] Here the debt on the warrant of attorney was occasioned not by the first debt, but by the promissory note which the plaintiff delivered up to be cancelled. The object of the act was, to protect those who were creditors before the discharge of the insolvent. Persons becoming creditors subsequently to the discharge, were not within the contemplation of the legislature. [*Bayley J.* Does not this warrant of attorney injure the rights of the other creditors, as to their claim upon the future effects of the insolvent?] The difficulty of obtaining the future effects of the insolvent by the provisions of the act is such, that they can scarcely be said to have their rights affected; though it must be confessed, that the payment of the debt under this warrant of attorney must be provided for, before any part of the future effects could be divided among the other creditors specified in the defendant’s schedule. This, however, is not an application on the part of any of the other creditors, whose rights might, by possibility, be affected by it, but of the defendant himself, who having, for his own benefit, and to avoid a severe judgment by the Court before whom he sought to be discharged, entered into a subsequent security, seeks to get rid of it, now that his creditor is without remedy against him, under the provisions of the insolvent act. The effect of a judgment of imprisonment against him, under the 18th section of the act, would have been to drive him to procure his liberty, by application to friends to enable him to discharge the debt due to the plaintiff, which would require him to contract debts to those friends, which it could not be contended would not be legitimately contracted, so as to entitle them to be provided
for

1821.

JACKSON
against
DAVISON.

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 against
 DAVISON.

for out of the future effects, as debts contracted subsequently to the discharge, in preference to the debts in the schedule. The arrangement now sought to be set aside, has merely effected the same object by a less circuitous mode. The Court, therefore, will be very unwilling to relieve the defendant in this case, upon the plea that the security which he has given to the plaintiff is contrary to the policy of the insolvent act.

Gurney and Abraham, contra. It is contrary to the policy of the insolvent debtors' act, that this warrant of attorney should be permitted to operate as a valid security. The object of the legislature was, that the person of the debtor should be free, as to all debts contracted, incurred, or occasioned before his discharge, and that his property, acquired after his discharge, should be distributed among all his creditors. Now the debt due upon this warrant of attorney, was one occasioned, at least, before the discharge, within the meaning of that word in the 8th section. If it be permitted to stand, the plaintiff will thereby take a portion of the future property of the debtor, to the prejudice of the general creditors; or he may even take out execution against the person of the debtor. On the other hand, if the debtor has fraudulently contracted debts, fair dealing to the public requires that he should be opposed on that ground, and he might then have been subjected to further imprisonment, under section 18. In *Wilson v. Kemp (a)*, it was held, that an insolvent debtor, who had taken the benefit of the insolvent act then in force, was not liable to arrest, upon a subsequent promise to pay a debt contracted prior to the day prescribed in the act. The words in that act were, that no person shall

(a) 3 M. & S. 595.

here-

hereafter be imprisoned, by reason of any debt contracted, incurred, occasioned, owing, or growing due, before, &c. That case is expressly in point; for in this case, the old debt was the only consideration for the warrant of attorney.

1821.

JACKSON
against
DAVISON.

BAYLEY J. I am of opinion that the rule for setting aside this warrant of attorney and judgment ought to be made absolute. It is part of the policy of the insolvent debtors' act, that the property of the debtor shall be divided rateably amongst his creditors. Now, if this warrant of attorney were to stand as a valid security, it might operate in fraud of the general body of creditors, by enabling the present plaintiff to take from them a large portion of the future effects of the debtors, which the legislature manifestly intended to be distributed among all the creditors. Now, it has been held in the case of a composition deed, that if one of the creditors, before executing the deed, obtain from the insolvent a security for the residue of his demand, by refusing to execute until such security be given, that security is void in law, because it is a fraud upon the rest of the creditors. (a) So, too, by the express provisions of the bankrupt laws, any security given to a creditor as a consideration to persuade him to sign a certificate, is void. Now, it was manifestly the intention of the legislature, by this act of parliament, to secure a portion of the future effects of the debtors for the benefit of those creditors whose names are inserted in the schedule. By section 25., the insolvent court is authorised to order judgment to be entered up against the debtor for the amount of the debts for which he

(a) See *Cockshott v. Bennett*, 2 T. R. 763. *Jackson v. Lomas*, 4 T. R. 166. *Jackson v. Duchaire*, 3 T. R. 551. *Leicester v. Rose*, 4 East, 372.

shall

1821.

**JACKSON
against
DAVISON.**

shall be discharged ; and when the prisoner is of ability to pay such debts, or any part, the Court may then permit execution against the property acquired by such prisoner after his discharge, for such sum as, under all the circumstances of such prisoner, the Court shall order ; the sum levied is to be distributed rateably among the creditors. This warrant of attorney, if supported, would interfere materially with the policy of the act, by taking from the body of the creditors a portion of those funds which the legislature meant to be distributed among all, and by defeating the effect of the judgment entered up by order of the insolvent court. It was given in pursuance of an agreement between the parties made before the discharge of the prisoner, and for the express purpose of defeating the object of the act. I think, therefore, that it ought not to stand as a valid security. This rule, therefore, must be made absolute.

HOLROYD J. I am of the same opinion. This warrant of attorney was founded upon an agreement which is in direct opposition to the policy of this act of parliament. The object of the act was, that the person of the debtor should be free, with respect to all those debts from which he had been discharged ; and that his future effects only should be liable in the mode there pointed out. Now, if this warrant of attorney were to stand as a valid security, the present plaintiff would be entitled to have execution for a debt which existed before the debtor's discharge, without any application to the insolvent court ; for his judgment would not be under the controul of that court. He would, by these means, be enabled either to take from the rest of the creditors the property subsequently acquired, or, if there was no property, he might even take the person of the debtor in execution,

tion, which is directly in the teeth of the act of parliament. I think, therefore, that this warrant of attorney, and the judgment entered up thereon, ought to be set aside. This rule must be made absolute.

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against
DAVISON.

BEST J. I am of the same opinion. This warrant of attorney operates in fraud of the general body of creditors. It has been held, that where creditors enter into a composition deed, and one of them take a security for a larger sum than that stipulated to be paid by the deed, that such security is void; because the temptation to give the security is a fraud on the creditors who were parties to the contract on which their debts were to be cancelled in consideration of receiving a composition. Now, in that case, the creditors are not prejudiced in the same degree as they are in this; because here the future effects of the insolvent are, by the provisions of this act, directed to be divided rateably among the creditors until their debts are wholly paid. By enforcing such a security, we should enable the plaintiff to deprive his co-creditors of some portion of that fund which the legislature intended to be rateably distributed among all. This rule must therefore be made absolute.

Rule absolute. (a)

(a) *Abbott C. J.* was absent at the privy council.

BURT *against* WALKER.

Wednesday,
July 11th.

THIS was an action upon a bail bond, brought in Easter term last. Plea, non est factum. The bond was witnessed by one *Smith*, a clerk of the defendant, who was subpoenaed, said that he would not attend; and the trial had been put off twice in consequence of his absence. Search had also been made at the defendant's house, and in the neighbourhood; and upon receiving information at the defendant's that the witness was gone to *Margate*, enquiry was there made without success. Held that under these circumstances, evidence of his hand-writing, was admissible.

The clerk of the defendant was the subscribing witness to a bond, and when he was

who

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against
WALKER.

who had been subpoenaed at the defendant's counting house, and at the time of serving the subpoena, said that he should not attend. Evidence, however, was given, that he did attend when the cause stood in the paper for trial the first time, which was six weeks before the actual trial. The trial had been before twice put off on account of *Smith's* absence, upon affidavits that he could not be found. Search was then made for him at the defendant's house, and in the neighbourhood; and it was likewise proved, that, upon receiving information at the defendant's house, that he was gone to *Margate* upon his master's business, the clerk of the plaintiff's attorney was sent thither to search for him. The affidavits stated, that he had been searched for up to the moment of trial, and could not be found. The cause was tried at the last sitting in this term before *Holroyd J.* who admitted evidence of his hand-writing, but reserved the point.

Holt moved for a rule to shew cause, why there should not be a new trial in this case, on the ground that secondary evidence of the execution of the bond by the defendant had been improperly admitted. Here the witness had been subpoenaed, and actually attended only six weeks previous to the trial. Besides, the witness was in the condition of a travelling clerk to a mercantile house, and, with reference to such condition, the search had not been sufficient to justify the admission of secondary evidence. It is to be observed that none of the previous cases have gone so far as the present. In none had the witness been subpoenaed and attended, and at so short a time previous to the actual trial. His absence under such circumstances might be good ground for putting off the trial,

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 BURN
 against
 WALKER.

trial, but not for admitting secondary evidence. The principle of all the cases seems to be this: that the evidence offered, that the witness could not be found, should be sufficient to justify the reasonable inference, either that he was kept out of the way by collusion, or that he was absent under circumstances which precluded any reasonable expectation that he would be forthcoming at the trial. But neither of these inferences was justified by the evidence in the present case. Besides, the sufficient and reasonable search must always have reference to the circumstances and condition of the witness. Suppose a witness to be a traveller to a mercantile house. The same search would not be sufficient for a witness of this description, as for a witness having a fixed residence. He cited *Wardell v. Fermor* (a), *Parker v. Hoskins* (b), *Cunliff v. Sefton*. (c)

ABBOTT C. J. I remember the case well, and there was strong ground for believing that the witness was kept out of the way, purposely, by the defendant. It appears, that upon receiving the subpoenas, the witness said he would not attend. I do not believe that he did attend with any view of exhibiting himself as a witness. I think that due and diligent search was made for him, and that the search was made with reference to his condition. The case of *Crosby v. Percy* (d) is strong as the present. Upon the ground of collusion, and not believing that the postponement of the trial would have assisted the plaintiff in obtaining the attendance of this witness, I think that the evidence of his hand-writing was properly admitted.

(a) 2 *Campb.* 282.(b) 2 *Taunt.* 223.(c) 2 *East*, 183.(d) 1 *Taunt.* 365.

BAYLEY

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 BURT
 against
 WALKER.

BAYLEY J. The search must certainly be made with reference to the condition of the witness. I think that it has been so made in the present case. The clerk was referred to *Margate*, and went thither.

BEST J. The circumstance of the witness being subpoenaed would have been a strong feature, if the Court could believe that the witness actually attended according to the subpoena, but we do not believe this.

Rule refused.

HOLROYD *against* BREARE.

[N this case, reported ante, p. 43., the facts should have been thus stated: It was an action of trespass against the two defendants for taking the plaintiff's goods. They pleaded, first, the general issue; and, secondly, separate justifications, under a judgment and execution against the goods of a third person. At the trial, a verdict was found for both defendants, on their pleas of justification as to the major part of the goods; but it turned out that there were some goods taken, the property of the plaintiff, and a verdict was consequently found against them as to those goods, upon the general issue. A motion was afterwards made (see ante, vol. 2., p. 473.); and the Court then ordered a verdict to be entered for the defendant *Breare*, generally; but as to the other defendant, *Holmes*, it was left undisturbed.

END OF TRINITY TERM.

AN
I N D E X
TO THE
PRINCIPAL MATTERS.

ABATEMENT.

Defendant having pleaded in abatement, that four others were jointly liable with himself, the plaintiff applied to the defendant's attorney to give the places of residence and additions of those persons, which he refused, unless the action were discontinued. Under these circumstances, the Court made a rule absolute for the defendant to deliver such particulars, or in default thereof, for setting aside the plea. *Taylor and Others v. Harris*, M. 1 G. 4. Page 93

ACTION ON THE CASE.

1. A carrier had given notice that he would not be answerable for parcels of value, unless entered and paid for as such; and the plaintiffs, with the knowledge of this, delivered a parcel, containing bank notes to a large amount, without informing the carrier of its contents. The coach in which the parcel was conveyed, was left at midnight, standing for some time in the middle of a very wide street, with a porter, who was ordered to watch it; during this time the parcel was stolen. At
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ACTION ON THE CASE.

- the trial, two questions having been left to the jury, first, whether the plaintiffs had been guilty of any unfair concealment, by not informing the carrier of the nature and value of the parcel; and, secondly, whether the carrier had been guilty of gross negligence: Held, by three Judges (*Best J. dissentiente*) that the direction to the jury was right. *Batson v. Donovan*, M. 1 G. 4. Page 21
2. Where an attorney for the plaintiff suffered the case to be called on without previously ascertaining whether a material witness, whom the plaintiff had undertaken to bring into court had arrived, in consequence of which the plaintiff was nonsuited: Held, that in an action against him for negligence, it was properly left to the jury to say, whether he had used reasonable care in conducting the cause; and the jury having found in the negative, the Court refused to disturb the verdict. *Reece v. Righy*, H. 1 and 2 G. 4. 202
 3. Where lights had been enjoyed for more than 20 years, contiguous to land which, within that period had been glebe land, but was
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conveyed to a purchaser, under the 55 G. 3. c. 147., it was held that no action would lie against such purchaser for building so as to obstruct the lights, inasmuch as the rector, who was tenant for life, could not grant the easement, and therefore no valid grant could be presumed. *Barker v. Richardson*, T. 2 G. 4. Page 579

AGREEMENT,

See FRAUDS, STATUTE OF.

ALE,

See APPEAL, 3.

ALIEN ENEMY,

See INSURANCE, 2.

ANCHOR,

See PATENT.

ANNUITY.

1. By letters patent, 24 Car. 2., the king granted to the use of A., his heirs and assigns for ever, an annuity of 1000*l.* to be paid out of his revenue of four and a half per cent. at *Barbadoes* and the *Leeward* islands: Held, that this annuity was personal property, and duly passed under a will attested by two witnesses, by a residuary clause bequeathing all the rest, residue, and remainder of a testatrix's personal estate of what nature or kind soever, to her executors. *Aubin v. Daly*, M. 1 G. 4. 59
2. Where part of the consideration money for an annuity had been deposited in the hands of the grantee's attorney, till certain houses, out of which the annuity was granted, should be completed; but it appeared that the money deposited had all been paid over to the grantee in a short time after the date of the deeds, and there was no fraud in the trans-

action, the Court refused to set aside the annuity, on the ground that the power given to them by the 53 G. 3. c. 141. s. 6. was discretionary, and that this was not the case of a fraudulent retainer contemplated by the act:

Held, also, that in the memorial of an annuity, under 53 G. 3. c. 141., it is sufficient to state that the annuity was granted for the lives of A. B., &c. (naming them), without stating their description by residence or otherwise, or adding that the annuity was granted for their joint lives or the life of the survivor, or for a term of years determinable on those lives:

Held, also, that in the memorial of a warrant of attorney to confess judgment, as a collateral security for an annuity, it is not necessary to state for what penal sum it authorises a confession of judgment. *Barber v. Gamson*, H. 1 and 2 G. 4. Page 281

APPEAL.

- 1 By 50 G. 3. c. 48. s. 25., it is provided, that any party aggrieved by the conviction under that act, who shall enter into a recognizance to appear at the next sessions, shall be at liberty to appeal to such sessions: Held, that this dispenses with the necessity of any notice of appeal; and that, if the party duly enter into the recognizance, the sessions are bound to hear the appeal. *The King v. The Justices of Essex*, H. 1 and 2 G. 4. 276
2. Where by charter the magistrates of a borough, which was a county of itself, held only general sessions twice a year, and not quarter sessions: Held, that an appeal against an order of removal might be made to the next general sessions of the peace for such borough. *The King v. The Justices of Carmarthen*, H. 1 and 2 G. 4. 291

3. No

ARBITREMENT.

3. No appeal lies to the sessions from a conviction for selling ale without an excise licence, under 48 G. 3. c. 143 s. 5. *The King v. Joseph Hanson, E. 2 G. 4.* Page 519

APPEAL, NOTICE OF.

Semble, that the entering into the recognizance required by 49 G. 3. c. 68. s. 5. before the justices, who make an order of bastardy, does not dispense with the necessity of giving such justices notice of appeal against the order, the statute requiring the party to give notice of bringing such appeal, "and of the cause and matter thereof." But held, that a parol notice of such appeal, and of the cause and matter thereof, will be sufficient. *The King v. The Justices of Salop, T. 2. G. 4.* 626

APPRENTICE.

An apprentice, bound for seven years to A., served him in his house between five and six years, and afterwards, for the remainder of the term, resided in his mother's house, having agreed with his master that he should be at liberty to work for whom he pleased, he paying 2s. per week to his master. The master, also, during this time, occasionally gave him work, for which he was not paid: Held, that this was not a continuance of the service to A. for seven years under the indenture. *The King v. Inman, M. 1 G. 4.* 55

ARBITREMENT.

Where a case was referred by order of nisi prius, and after the reference, but before the making of the award, the plaintiff became bankrupt: Held, that this was no

ATTORNEY. 703

revocation of the submission, and that the arbitrator having awarded a verdict for the defendant, had done right. *Andrews v. Palmer, H. 1 and 2 G. 4.* Page 250

ARREST,

See PRACTICE, 20.

ASSUMPSIT,

See PLEADING, 3.

1. Where a return cargo belonging to plaintiff had been consigned by the defendant to B. and W., to be held at the orders of defendant, who had a lien on it, and such cargo had been sold by B. and W., and the lien satisfied: Held, that the plaintiff could not consider B. and W. as defendant's agents, so as to entitle him to maintain money had and received against the defendant, for the balance remaining in the hands of B. and W. *Tennant v. Mackintosh, T. 2 G. 4.* 594
2. Declaration stated; that plaintiff had cohabited with defendant as his mistress, and that it was agreed that no further immoral connexion should take place between them, and that defendant should allow her an annuity, as long as she should continue of good and virtuous life and demeanour; and thereupon, in consideration of the premises, and that plaintiff would give up the annuity, defendant promised to give her as much as the annuity is worth. Held bad upon general demurrer. *Bennington v. Wallis, T. 2 G. 4.* 650

ATTORNEY,

See PRACTICE, 1, 2, 3.

1. Where an attorney for the plaintiff suffered the case to be called on without previously ascertaining whether a material witness, whom the plaintiff had undertaken to bring into court, had arrived, in

consequence of which the plaintiff was nonsuited: Held, that in an action against him for negligence, it was properly left to the jury to say, whether he had used reasonable care in conducting the cause; and the jury having found in the negative, the Court refused to disturb the verdict. *Reece v. Rigny*, H. 1 and 2 G. 4. Page 202

2. The plaintiff, after judgment recovered, settled the action with the defendant, and employed a new attorney to enter up satisfaction on the record: Held, that the defendant was entitled to be discharged out of custody, although the lien of the plaintiff's attorney on the costs had not been satisfied. *Marr v. Smith*, E. 2 G. 4. 466

AUCTIONEER.

See *HAWKER v. PEDLAR*, 1, 2.

AWARD.

See *RULES OF COURT*.

Where a case was referred by order of nisi prius, and after the reference, but before the making of the award, the plaintiff became bankrupt: Held, that this was no revocation of the submission, and that the arbitrator having awarded a verdict for the defendant, had done right. *Andrews v. Palmer*, H. 1 and 2 G. 4. 250

BAIL.

1. The bail to the sheriff are discharged by the defendant's giving a cognovit for payment of debt and costs. *Farmer v. Thorley*, M. 1 G. 4. 91
2. The proceedings in an action on the bail bond having been stayed, the defendant pleaded to the original action, the general issue, and subsequently a plea of bankruptcy, puis danein continuance.

There being no affidavit, that the application to stay the proceedings was made on the part of the bail, the Court now set aside the latter plea, and restrained the defendant to his plea of general issue, on the ground, that when the proceedings were stayed in the action on the bond bail, it was intended, that the defendant should only question the validity of the original debt. *Dowson v. Levi*, H. 1 and 2 G. 4. Page 249

3. Bail above are not sureties, or persons liable for the debt of a bankrupt, within 49 G. 3. c. 121. s. 8. *Newington v. Keeys*, E. 2 G. 4. 493

BANKRUPT.

1. Where A. having drawn a bill of exchange for 148*l.* in favour B., to whom he was previously indebted in that amount, committed an act of bankruptcy before either the bill was due, or had been presented for acceptance. Held that such bill of exchange was a good petitioning creditor's debt, although it appeared, that subsequently to the commission, the bill had been duly presented and paid by the acceptors. *Ex parte Douthat*, M. 1 G. 4. 67
2. A creditor of an insolvent trader may, after the debtor's discharge under the 53 G. 3. c. 102., take out a commission of bankruptcy against him; and his debt, although included in the insolvent schedule, will be a sufficient petitioning creditor's debt at law to support the commission. *Jellis, assignee of Routledge v. Mountford*, H. 1 and 2 G. 4. 256
3. In assumpsit by the provisional assignee of a bankrupt, defendant pleaded the general issue: Held, that the fact of the bankrupt's estate having been assigned by the

BANKRUPT.

the provisional assignee to the new assignees, between the time of issuing the latitat and the delivery of the declaration, is no ground of nonsuit upon a plea of non assumpsit. *Quære*, Whether it would have been an answer to the action, if specially pleaded? *Page, Assignee v. Bauer, E. 2 G. 4.* Page 345

4. A bankrupt, on the day appointed for his last examination before the commissioners, promises to produce a balance sheet, if further time be given. Several adjournments take place, during a period of ten months, at which adjournments he represents an account in writing to be necessary, in order to make the discovery required of his estate and effects; and he promises from time to time to produce the balance sheet. That not being produced at the last adjournment, and no sufficient reason being given by him for not producing it, it was held, that the commissioners were justified in committing him. *Davie v. Mitford and Others, E. 2 G. 4.* 356
Semble, That by the 5 G. 2. c. 30. s. 1. the bankrupt is bound to render to the commissioners, if required, an account in writing of his estate and effects. *ibid.*
5. A fraudulent conveyance made voluntarily by a trader, in order to give a preference to particular persons to the prejudice of his general creditors, is an act of bankruptcy, although the bankrupt subsequently continued to carry on his trade for three years, at the end of which time a commission issued. *Pulling v. Tucker, E. 2 G. 4.* 382
6. A person living in the *Isle of Man*, coming from time to time to *England*, and buying goods which are afterwards sold in the

BILL OF EXCHANGE. 705

Isle, is a trader against whom a commission of bankrupt may issue in *England*, although he in fact never sold any goods in *England*. *Allen v. Cannon, E. T. 2 G. 4.*

Page 418

7. Bail above are not sureties, or persons liable for the debt of a bankrupt, within 49 G. 3. c. 121. s. 8. *Newington v. Keeys, E. 2 G. 4.* 493
8. The issuing a commission of bankruptcy is not of itself sufficient notice to all the world of a prior act of bankruptcy having been committed; and, therefore, if a payment be made of a debt to a bankrupt after the issuing of such commission, but before the party paying has any actual knowledge of the bankruptcy, such payment will be protected within 1 Jac. 1. c. 15. s. 14. *Sowerby v. Brooks, E. 2 G. 4.* 523
9. A bill of exchange drawn by defendant in *Ireland*, and accepted and paid by plaintiff in *England*, is a debt contracted in *England*, and cannot therefore be discharged by a certificate under an *Irish* commission of bankruptcy. *Lewis v. Owen, T. 2 G. 4.* 655

BARON AND FEME,

See PRACTICE, 17.

Where a husband, not separated from his wife, makes an allowance to her for the supply of herself and family with necessaries during his temporary absence, and a tradesman with notice of this, supplies her with goods, the husband is not liable for the debt. *Holt v. Brien, H. 1 and 2 G. 4.* 252

BILL OF EXCHANGE,

See PROMISSORY NOTE.

1. Where A. having drawn a bill of exchange for 148*l.* in favour of
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706 BILL OF EXCHANGE.

B., to whom he was previously indebted in that amount, committed an act of bankruptcy before either the bill was due or had been presented for acceptance: Held, that such bill of exchange was a good petitioning creditor's debt, although it appeared that, subsequently to the commission, the bill had been duly presented and paid by the acceptors. *Ex parte Douthat*, *M. 1 G. 4.* Page 67

2. A bill of exchange having been accepted generally, the drawer, without the consent of the acceptor, added the words "payable at Mr. B.'s, Chiswell Street:" Held, that this was a material alteration, and that the acceptor was thereby discharged. *Cowie and Another v. Halsall*, *H. 1 and 2 G. 4.* 197

3. When the acceptor of a bill of exchange, having made it payable at Messrs. C. and Co's., has not sufficient effects in their hands at the time when the bill becomes due, he is not entitled to notice of its dishonour: Query, whether, in the case of such an acceptance, any notice be, under any circumstances, necessary. *Smith v. Thatcher*, *H. 1 and 2 G. 4.* 200

4. In an action against the drawer of a bill payable at a particular place, it is no defence that no notice of the dishonour has been given to the acceptor: nor is it any defence that the bill was accepted for a gaming debt, if it be indorsed over by the drawer for a valuable consideration, to a third person, by whom the action is brought. *Edwards v. Dick*, *H. 1 and 2 G. 4.* 212

5. In an action against the acceptor of a bill payable at a banker's, it is not necessary to prove notice of non-payment to the acceptor. *Treacher v. Hinton*, *E. 2 G. 4.* 413

CANAL ACT, &c.

6. The indorser of a bill of exchange which had been dishonoured, and which a subsequent indorser had made his own by laches, paid the bill, and immediately gave notice of dishonour to the defendant, a prior indorser: Held, that the plaintiff could not recover the amount, although it appeared, that the defendant, in case successive notices had been given by all the parties on the bill, could not have received notice of dishonour at an earlier period. *Turner v. Leeck*, *E. 2 G. 4.* Page 451

7. A bill of exchange drawn by defendant in Ireland, and accepted and paid by plaintiffs in England, is a debt contracted in England, and cannot, therefore, be discharged by a certificate under an Irish commission of bankruptcy. *Lewis v. Owen*, *T. 2 Geo. 4.* 654

BRIDGE.

The Court of Quarter Sessions cannot impose more than one fine for the non-repair of a bridge. *The King v. The Inhabitants of Machynlleth*, *E. 2 G. 4.* 469

BROKER.

See INSURANCE BROKER, 1.

BYE LAW.

See CORPORATION.

CANAL ACT, CONSTRUCTION OF.

An act of parliament provided, that the *M.* Canal Company should not take any higher or greater rate of tonnage than should, for the time being, be taken by the *B.* Canal Company; and the latter, by a resolution at a general assembly, and under their com-
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CERTIORARI.

mon seal, reduced their tolls: Held, that the *M. Canal Company* could not question collaterally the validity of such resolution, but were bound by it. The *B. Canal Company's* act directed, that no reduction of the tolls should take place, unless assented to by two-thirds of the proprietors; but allowed them to vote by proxy, a form for which instrument was given by the act. *Quære*, Whether such instrument requires to be stamped. *The Monmouthshire Canal Company v. Kendal*, *E. 2 G. 4.* Page 453

CARRIER.

A carrier had given notice that he would not be answerable for parcels of value, unless entered and paid for as such; and the plaintiffs, with the knowledge of this, delivered a parcel containing bank notes to a large amount, without informing the carrier of its contents. The coach in which the parcel was conveyed, was left at midnight, standing for some time in the middle of a very wide street, with a porter, who was ordered to watch it; during this time the parcel was stolen. At the trial two questions having been left to the jury, first, whether the plaintiffs had been guilty of any unfair concealment by not informing the carrier of the nature and value of the parcel; and, secondly, whether the carrier had been guilty of gross negligence: Held by three judges, (*Best J.* dissentiente) that the direction to the jury was right. *Batson v. Donovan*, *M. 1 G. 4.* 21

CERTIORARI.

The notice required by 13 G. 2. c. 18. s. 5. for removing an order of Justices by certiorari, must

COMMON. 707

state on the face of it the name of the party applying for the writ. *The King v. The Justices of Lancashire*, *H. 1 and 2 G. 4.* Page 289

CHALLENGE.

See JURY.

COMMISSION TO EXAMINE WITNESSES.

A commission for the examination of witnesses in a foreign country, directed the commissioners to examine the witnesses on interrogatories, and to reduce the examinations into writing in the *English* language, and send the same to *England*, and to swear an interpreter to interpret the depositions of such witnesses as did not understand the *English* language. It appeared by the return that the depositions, in the first instance, were reduced into writing in the foreign language, and translated by the interpreter into the *English* language within an interval of six weeks: Held, that the commission was well executed by the commissioners returning the depositions so translated into the *English* language. *Atkins v. Palmer*, *E. 2 G. 4.* 377

COMMON.

Where the plaintiff being possessed of house and land in *E.*, had for 60 years exercised rights of common in *W.*; but it appeared, that this was done near the boundary of two commons of *W.* and *E.*, which lay open and uninclosed, adjacent to each other; and it also appeared, that the parties exercising the right did not at the time know the exact boundary, and that plaintiff had, on a previous inclosure of the *E.* common, obtained an allotment there

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in respect of his estate: Held, that the Judge was right in leaving it to the jury to say, whether the evidence was referable to an exercise of the right in *E.*, and a mistake of the boundary, or to an exercise of the right in *W.* *Hetherington v. Vane*, *E. 2 G. 4.* Page 428

COMPOSITION DEED.

Before the execution of a composition deed, it was agreed, in the presence of the surety for the payment of the composition, that it should be void, unless all the creditors executed it. The surety, at the same interview, afterwards executed the deed in the ordinary way, without saying anything at the time of execution. The deed was then delivered to one of the creditors, in order that he might get it executed by the rest of the creditors: Held, that this was to be considered a delivery of the deed as an escrow, and that all the creditors not having executed it, the surety was not bound. *Johnson v. Baker*, *E. 2. G. 4.* Page 440

CONTEMPT.

1. A court of general gaol delivery has the power to make an order to prohibit the publication of the proceedings pending a trial likely to continue for several successive days, and to punish disobedience to such order by fine.

Service of an order of such court, calling upon the editor of a newspaper "to answer for contemptuously publishing such proceedings," at the office at which the newspaper was published, is good service within the 38 G. 3. c. 78. s. 12.; and the editor not having appeared, the fine was held to be properly imposed upon him in his

absence. *The King v. Clement*, *H. 1 and 2 G. 4.* Page 218

2. A judge at nisi prius has the power of fining a defendant for a contempt committed by him in the course of addressing the jury. *The King v. Davison*, *H. 1 and 2 G. 4.* 329

CONVICTION.

1. By 50 G. 3. c. 48. s 25., it is provided, that any party aggrieved by the conviction under that act, who shall enter into a recognizance to appear at the next sessions, shall be at liberty to appeal to such sessions: Held, that this dispenses with the necessity of any notice of appeal; and that, if the party duly enter into the recognizance, the Sessions are bound to hear the appeal. *The King v. The Justices of Essex*, *H. 1 and 2 G. 4.* 276
2. In a conviction of defendant for causing to be acted at a certain place called the *Coburg Theatre*, in the parish of *St. Mary, Lambeth*, for gain and reward, a certain entertainment of the stage called *Richard the Third*, the evidence set forth was, that the defendant was seen once or twice at the rehearsals of *Richard*; that another person was stage-manager; that defendant engaged *I. S.* to perform, and gave him a check for the amount of his benefit: Held, that this was sufficient to warrant the justices in drawing the conclusion, that the defendant caused the play of *Richard the Third* to be performed.

The conviction also stated, after the appearance and plea of defendant, that divers credible witnesses, to wit, *I. S.*, &c., came before the justices upon their several oaths, to them severally and respectively, and in the presence

sence of the said *I. S., &c.*, duly administered: Held, that taking it altogether, it did substantially appear that the oath was administered to the witnesses in the presence of the magistrates.

The evidence also stated, that the *Coburg Theatre* was in the parish of *Lambeth*, and the adjudication of the penalty was to the poor of the parish of *St. Mary, Lambeth*: Held, that this was no variance, it not appearing that there were two distinct parishes so named. *The King v. Glossop*, *T. 2 G. 4.* Page 616

COPYHOLD.

A copyhold was surrendered to the use of husband and wife, for their natural lives and the life of the longer liver of them, and from and after the decease of the survivor of them, to the right heirs of the survivor for ever: It was held, that the husband and wife took a vested estate, not only for their joint lives, but also for the life of the survivor, with a contingent remainder in fee to the survivor. *Doe, dem. Dormer, v. Wilson*, *H. 1 and 2 G. 4.* 303

CORPORATION.

A bye law of a corporation directed that, upon the happening of any vacancy in the number of 24 common council, such vacancies should be filled by the freemen inhabiting the town; and that a court should be holden once every year, at which it should be lawful for the bailiffs to admit to the freedom of the town, such persons as had been resident therein for one whole year: Held, that this bye law did not give to every person who had been so resident for that period, an absolute right to be admitted to the freedom of the borough; and the Court re-

fused a mandamus to the bailiffs to admit such a person. *The King v. Bailiffs and Corporation of Eye*, *H. 1 and 2 G. 4.* Page 271

COSTS.

In trespass, two defendants appeared by the same attorney, and pleaded, 1st, general issue, and 2d, separate justifications. *A.* obtained a verdict generally, and *B.* obtained a verdict on his justification, but the plaintiff succeeded against him on the general issue: Held, 1st, that *B.* was not entitled to any costs on the issue found for him.

2d, That the Master, in taxing *A.*'s costs, was right in allowing only one-half of the attorney's costs for appearance, &c.

3d, That the costs due from the plaintiff to *A.* could not be set off against the costs due from *B.* to the plaintiff. *Holroyd v. Breare*, *M. 1 G. 4.* 43, 700

COUNTY.

The Court will not take judicial notice of the local situation and distances of the different places in the counties of *England* from each other; and therefore, where a return to an habeas corpus stated, that the prisoner was found on board a vessel, discovered within eight leagues of that part of the coast of *G. B.* called *Suffolk*, to wit, within eight leagues of *O.*, in that county, it was held not to be averred with sufficient certainty, that the vessel was not within four leagues of the coast of *G. B.*, between the *North Foreland* in *Kent*, and *Beachy-Head* in *Sussex*. *Deybel's case*, *H. 1 and 2 G. 4.* 243

COVENANT.

A covenant by a lessor to supply the premises demised, (which were two

two houses,) with a sufficient quantity of good water, at a rate therein mentioned for each house, is a covenant that runs with the land, and for the breach of which the assignee of the lessee may maintain an action against the reversioner. *Jourdain v. Wilson*, H. 1 and 2 G. 4. Page 266

CUSTOM.

A custom that none but a freeman, or the widow or partner of a freeman, should sell by retail in a city, or the suburbs, is valid in law. *The Mayor of York v. Welbank*, E. 2 G. 4. 438

DEATH,

See EVIDENCE.

DEED,

See ESCROW.

By deed, a mortgage conveyed to the mortgagor the legal estate on being paid the mortgage-money, and the latter reconveyed it to trustees, for the purpose of securing an annuity. At the time of the execution by the mortgagee, there were several blanks in the deed, but not in that part which affected him. The blanks left were for the sums to be received by the mortgagor from the grantees of the annuity, and were all filled up at the time of the execution of the deed by the mortgagor; but several interlineations were made in that part of the deed after the execution by the mortgagee. It was held that the deed was not therefore void, but operated as a good conveyance of the estate from the mortgagor to the trustees for the payment of the annuity. *Doe, dem. Lewis v. Bingham*, T. 2 Geo. 4. 672

Held, also, that it was not incumbent on the plaintiff in ejectment, brought on this deed, to prove that the annuity was duly enrolled. *ibid.*

Held, also, that the tenant in possession was not competent to prove that the witness, and not the defendant, was the possessor of the land. Page 672

DEVIATION,

See INSURANCE, 1.

DEVISE,

See EVIDENCE, 2.

DISTRESS.

A reasonable time after the expiration of five days from the time of distress, is by law allowed to the landlord for appraising and selling the goods distrained. *Pitt v. Shew*, H. 1 and 2 G. 4. 208

EASEMENT,

See ACTION ON THE CASE, 3.

EJECTMENT,

See RULES OF COURT.

ESCROW.

Before the execution of a composition-deed, it was agreed, in the presence of the surety for the payment of the composition, that it should be void, unless all the creditors executed it. The surety, at the same interview, afterwards executed the deed in the ordinary way, without saying any thing at the time of execution: the deed was then delivered to one of the creditors, in order that he might get it executed by the rest of the creditors: Held that this was to be considered a delivery of the deed as an escrow, and that all the creditors not having executed it, the surety was not bound. *Johnson v. Baker*, E. 2 G. 4. 440

EVIDENCE.

1. In the proof of a pedigree, the dying declarations of A., as to the

the relationship of the lessor of the plaintiff to the person last seised, are not receivable in evidence. *Doe, dem. Sutton, v. Ridgway, M. 1 G. 4. Page 53*

2. A testator, by his will, devised to *Matthew W.*, his brother, and *Simon W.*, his brother's son, a certain estate. It appeared that the testator had three brothers, each of whom had a son of the name of *Simon* living at the time of the testator's death: Held that the proof of this fact did not raise any latent ambiguity in the will, so as to let in parol evidence of declarations of the testator, as to the person intended; it being clear, that the person entitled was *Simon*, son of *Matthew*. *Doe, dem. Westlake, v. Westlake, M. 1 G. 4. 57*

3. On an information for writing, composing, and publishing a libel in the county of *L.*, it appeared that the defendant, on the 22d *August*, wrote and composed the libel in *L.*, and that he was seen in *L.* on that and the following day. On the 24th, the libel was delivered in the county of *M.* (100 miles off) by *A.* to *B.*, being inclosed in an envelope addressed to *A.*, containing written directions to *A.* to forward the libel to *B.*, by whom it was subsequently published in *M.* The envelope was open; and it was not proved that there was on it any trace of a seal or post-mark. *A.* was not called at the trial as a witness by either party; nor was it proved that he was a resident, or had been about that time in *L.*: Held, by three Justices, (dissentiente *Bayley J.*) that this was evidence on which the jury might properly be left to presume that the libel was delivered open to *A.* in *L.*

Held, also, by three Justices,

(*Bayley J. dubitante*), that a delivery at the post-office in *L.* of a sealed letter, inclosing a libel, is a publication of the libel in *L.* Held, also, by three Justices, (*Bayley J. dubitante*) where a defendant writes and composes a libel in *L.* with the intent to publish, and afterwards publishes it in *M.*, that he may be indicted for a misdemeanor in either county.

And, *per totam Curiam*, where a libel imputes to others the commission of a triable crime: Held, that evidence of the truth of it is inadmissible. Held, also, where, in summing up, the Judge told the jury that the intention was to be collected from the paper itself, unless explained by the mode of publication, or other circumstances; and that, if its contents were likely to excite sedition, &c. defendant must be presumed to intend that which his act was likely to produce; and that, if they found such to be the intent, he was of opinion it was a libel; and that they were to take the law from him, unless they satisfied that he was wrong; that this was a correct mode of leaving the question to the jury under 32 G. 3. c. 60. s. 1.

Quære, whether the writing and composing of a libel with intent to publish, but not followed by publication, be an offence. *The King v. Sir F. Burdett, M. 1 G. 4.*

Page 95

4. In trespass, the declaration was for taking goods, chattels, and effects: Held that the plaintiff might recover the value of fixtures under these words. *Pitt v. Shew, H. 1 and 2 G. 4. Page 206*
5. In an action against an attorney, for negligence in the negotiation of an annuity, the party who, on the face of the deed, appeared to be the grantor, is a competent witness

witness to prove it a forgery.
Hunter v. King, H. 1 and 2 G. 4.

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6. In assumpsit, by the provisional assignee of a bankrupt, defendant pleaded the general issue: Held, that the fact of the bankrupt's estate having been assigned by the provisional assignee to the new assignees, between the time of issuing the writ and the delivery of the declaration, is no ground of nonsuit upon a plea of non-assumpsit. Quære, whether it would have been an answer to the action, if specially pleaded. *Page v. Bauer*, E. 2 G. 4. 345

7. In assumpsit, by one of two surviving partners, the fact of the plaintiff being surviving partner must be stated in the declaration; and, therefore, a count for goods sold by him to the defendant is not supported by proof that the goods were sold by the plaintiff and his deceased partner. *Jell v. Douglas*, E. 1 G. 4. 374

8. Entries in a steward's book above thirty years old, and coming from the proper custody, are admissible in evidence, without proving the hand-writing of the steward.

Semble, that the rule extends to all written documents coming from the proper custody. *Wynne, Bart. v. Tyrwhitt*, E. 2 G. 4. 376

9. Declaration stated, that defendant bargained for and bought of plaintiff a quantity of *E. I.* rice, according to the conditions of sale of the *E. I.* Company, to be put up at the next *E. I.* Company's sale by the proprietors, if required, at a certain price, there mentioned. The proof was, that, besides these conditions, the rice was sold per sample. This is no variance; the words "per sample" not being a description of the commodity sold, but a col-

lateral engagement that it shall be of a particular quality. *Parker v. Palmer*, E. 2 G. 4. Page 387

10. In trover by *A.* against *B.*, *C.* is a competent witness to prove property in himself. *Ward v. Wilkinson*, E. 2 G. 4. 410

11. Where the plaintiff, being possessed of house and land in *E.*, had, for 60 years, exercised rights of common in *W.*; but it appeared that this was done near the boundary of the two commons of *W.* and *E.*, which lay open and uninclosed adjacent to each other; and it also appeared that the parties exercising the right did not, at the time, know the exact boundary, and that plaintiff had, on a previous inclosure of the *E.* common, obtained an allotment there in respect of his estate: Held that the Judge was right in leaving it to the jury to say, whether the evidence was referable to an exercise of the right in *E.*, and a mistake of the boundary, or to an exercise of the right in *W.* *Hetherington v. Vane*, E. 2 G. 4. 428

12. The fact of a tenant for life not having been seen or heard of for fourteen years by a person residing near the estate, although not a member of his family, is *prima facie* evidence of the death of the tenant for life. *Doe, dem. Lloyd, v. Deakin*, E. 2 G. 4. 433

13. In assumpsit, for not indemnifying plaintiff, in consequence of his having become bail for *A.* in an action at the suit of *B.*, it was stated that *B.*, in *Mich* term 58 G. 3., recovered against plaintiff. The judgment given in evidence was in *Hilary* term: Held that this was no variance, inasmuch as this was not matter of description, but an allegation in substance that the judgment had been obtained before the commencement of the

the action. *Phillips v. Shaw*,
E. 2 G. 4. Page 435

14. A party, on being asked for the payment of his attorney's bill, admitted that there had been such a bill; but stated, that it had been paid to the deceased partner of the attorney, who had retained the amount out of a floating balance in his hands. Quere, whether, in order to take the case out of the statute of limitations, evidence is admissible to shew that the bill had never in fact been paid in this manner.

Semble, that such evidence is admissible, if at all, only where the defendant states the debt to be discharged by particular means, to which he refers with precision, and where he has designated the time and mode so strictly, that it is impossible it could be discharged in any other manner than that specified. *Beale v. Nind*,
T. 2 G. 4. 568

15. Upon a parol demise, rent to take place from the following *Lady-day*, evidence of the custom of the country is admissible to shew, that, by "*Lady-day*," the parties meant "*Old Lady-day*." *Doe, dem. Hall, v. Benson*, T.
2 G. 4. 588

16. In a conviction of defendant for causing to be acted at a certain place called *The Cobourg Theatre*, in the parish of *St. Mary, Lambeth*, for gain and reward, a certain entertainment of the stage called *Richard the Third*, the evidence set forth was, that the defendant was seen once or twice at the rehearsals of *Richard*; that another person was stage-manager; that defendant engaged *J. S.* to perform, and gave him a check for the amount of his benefit: Held, that this was sufficient to warrant the justices in drawing the conclusion, that the

defendant caused the play of *Richard the Third* to be performed. The conviction also stated, after the appearance and plea of defendant, that divers credible witnesses, to wit, *J. S. &c.*, came before the justices upon their several oaths, to them severally and respectively, and in the presence of the said *J. S., &c.*, duly administered: Held, that taking it altogether, it did substantially appear, that the oath was administered to the witnesses in the presence of the magistrates.

The evidence also stated, that the *Cobourg Theatre* was in the parish of *Lambeth*, and the adjudication of the penalty was to the poor of the parish of *St. Mary, Lambeth*: Held, that this was no variance, it not appearing that there were two distinct parishes so named. *The King v. Glossop*, T.
2 G. 4. Page 616

17. The clerk of the defendant was the subscribing witness to a bond, and when he was subpoenaed, said that he would not attend, and the trial had been put off twice in consequence of his absence. Search had also been made at the defendant's house, and in the neighbourhood, and upon receiving information at the defendant's that the witness was gone to Margate; enquiry was there made without success. Held, that under these circumstances, evidence of his hand-writing was admissible. *Burt v. Walker*, T.
2 G. 4. 697

EXCHEQUER BILL,

See TROVER, 1.

EXCISE,

See APPEAL, 3.

FACTOR.

A quantity of oats having been consigned by a merchant abroad, to be

be sold by *T. S.*, who was a merchant as well as factor, he placed them in the hands of *A.*, a corn-factor, as a security for advances made by him; but the oats were not to be sold without the consent of *T. S.* They remained in *A.*'s possession, upon these terms, for nine months, when they were transferred to *A.* by a sale at the market price. No money actually passed, nor were any account sales rendered; but the amount of the price was allowed in account between *T. S.* and *A.*, leaving a balance in favour of the latter: Held, that this was in substance a pledge, and not a sale by the factor; and that no property passed to *A.*, although the jury had found it to be a *bonâ fide* transaction. *Kuckein v. Wilson*, *E. 2 G. 4.* Page 443

FINE.

The court of quarter sessions cannot impose more than one fine for the non-repair of a bridge. *The King v. The Inhabitants of Machynlleth*, *E. 2 G. 4.* 469

FORFEITURE,

See LANDLORD AND TENANT, 2.

FOREIGN ATTACHMENT,

See PLEADING, 18.

FREEMAN,

See CUSTOM, 1.

FRAUDS, STATUTE OF.

1. By the 4th section of statute of frauds, an agreement to pay the debt of another must, in order to give a cause of action, be in writing, and must contain the consideration for the promise, as well as the promise itself, and parol evidence of the consideration is inadmissible. *Saunders v. Wakefield*, *T. 2 G. 4.* 595

2. A trust created in favour of a person, is 29 Car. 2. being confirmed by trustees at in trust for not jointly *Doe v. Go*

F

By a charterparty agreed to hire of the ship per ton, for home, in a certain time, the ship's residue in approval of the owner master, at charterer, who conditioned for the advance of the owner C. S. to be bills of lading "freight party." To C. and whom she homeward ship, and deposited goods taking for payable 60 the cargo; being been appearing in conjunction bills of lading "paying freight bill" were made B. and Co., was indebted outward cargo as C. and (the terms

GUNPOWDER.

Held, that the owner of the ship had a lien on these goods to the extent of the homeward freight.

C. and Co. also put on board the ship goods purchased by them on account of the charterer; but he being indebted to them, and B. and Co., their agents, those goods were, by the bill of lading, consigned to B. and Co.: Held, that as between the owner of the ship and B. and Co. the goods were to be considered as the goods of the charterer, and liable to the owner's lien on them for the freight due by charter-party.

In the charter-party, the freighter promised to pay and defray two-thirds of the port-charges: the owner having paid the whole, was held to have no lien on the goods shipped for those charges. *Faith v. The East India Company, T.* 2 G. 4. Page 630

GAMING.

In an action against the drawer of a bill, payable at a particular place, it is no defence that no notice of the dishonour has been given to the acceptor; nor is it any defence, that the bill was accepted for a gaming debt, if it be indorsed over by the drawer, for a valuable consideration to a third person, by whom the action is brought. *Edwards v. Dick, H.* 1 and 2 G. 4. 212

GLEBE,

See ACTION ON THE CASE.

GRANT,

See PATENT, 1.

GUNPOWDER.

A licence for the exportation of gunpowder was granted, on the petition of A. B., on behalf of himself and others, on condition

HABEAS CORPUS. 715

that the merchant exporter should give a certain security therein mentioned, A. B. the manufacturer of the gunpowder, sold it to C. D., and contracted to deliver it free on board a ship: Held, that the condition of this licence was not complied with by A. B.'s giving the required security, he not being the merchant exporter within the meaning of the licence. *Camelo v. Britten, M.* 1 G. 4. Page 184

HABEAS CORPUS.

1. The Court will not take judicial notice of the local situation and distances of the different places in the counties of *England* from each other; and therefore, where a return to an habeas corpus stated, that the prisoner was found on board a vessel, discovered within eight leagues of that part of the coast of *G. B.* called *Suffolk*, to wit, within eight leagues of *O.*, in that county it was held not to be averred with sufficient certainty, that the vessel was not within four leagues of the coast of *G. B.*, between the *North Foreland*, in *Kent*, and *Beachy-head*, in *Sussex*. *Deybel's case.* *H.* 1 and 2 G. 4. 243
2. Where a return to a habeas corpus stated that a vessel, with smuggled goods on board, was found at the fish-market, within the limits of the ancient town of *Ry*: Held, that it did not come within the 24 G. 3. *sess.* 2. c. 47. s. 1., by which, if a vessel be found at anchor, or hovering within the limits of any of the ports of this kingdom, or within four leagues of the coast thereof, with smuggled goods on board, she becomes liable to forfeiture. *Souden's case, H.* 1 and 2 G. 4. 294
3. Where the return to a habeas corpus stated that an *English*

seaman being found on board a ship liable to forfeiture under 45 G. 3. c. 121. s. 1., was carried before a magistrate, and upon due proof, as by the statute in that case made and provided is required, was committed, &c.: Held, that this was insufficient; and that it was necessary to state distinctly what proof was given, in order that the Court might see whether it was the due proof required by the 7th section of the act. *Nash's case*, H. 1 and 2 G. 4. Page 295

HAWKER AND PEDLAR.

1. A licensed auctioneer going from town to town in a public stage-coach, and sending goods by public waggons, and selling the same on commission by retail or by auction, at the different towns, is a trading person within the meaning of the 50 G. 3. c. 41. s. 6., and must take out a hawker's and pedlar's licence. *The King v. Turner*, E. 2 G. 4. 510
2. A person travelling from town to town, and having packages of books, &c. sent after him by public conveyance, and taking rooms at each town, and there selling such books, &c. by retail, by auction, is a trading person, within the 50 G. 3. c. 41. s. 7. *Dean q. t. v. King*, E. 2 G. 4. 517

HIGHWAY.

1. Where in an indictment against a township for non-repair of a road, the prescription stated and proved was, that its inhabitants had been immemorially used to repair all roads situate within it, which, but for such usage, would be repairable by the parish at large: Held, that this places the township in the situation of a parish, and that it is necessary for the defendants to shew by evidence

INCLOSURE ACT.

some other persons in certainty who are liable, in order to deliver themselves from their liability to repair. *The King v. The Inhabitants of Hatfield*, M. 1 G. 4.

Page 75

2. Where a road was set out by commissioners under a local act, and certain persons only were by the act to use it, but in fact it had been used by the public for many years, it was held that this was not sufficient evidence of a dedication to the public; and that if it was, there being no evidence that the parish had acquiesced in that dedication, it was not a public road which the parish were bound to repair. *The King v. St. Benedict*, (*The Inhabitants of*) E. 1 G. 4. 447
3. In a plea by the inhabitants of a county, that the inhabitants of a particular township have immemorially repaired the highway at the end of a county bridge situate within the township, it is not necessary to state any consideration for such prescription. *The King v. The Inhabitants of West Riding of Yorkshire*, T. 2 G. 4. 623

HOSPITAL.

A room in a parish workhouse, licensed pursuant to 13 G. 3. c. 82., and appropriated to the reception of, and used for the purpose of delivery of pregnant women resident within the parish, whether settled there or elsewhere, and the expence of which room was defrayed, in common with the general expenses of the workhouse, out of the parish rates, is not an hospital or place within the 13 G. 3. c. 82. s. 3. *The King v. Inhabitants of Manchester*, E. 2 G. 4. 504

INCLOSURE ACT.

The determination of the commissioners

sioners under an inclosure act, as to the boundaries of a parish to be inclosed, is not conclusive of the fact as to what were the boundaries antecedently to such determination. *The King v. The Inhabitants of St. Mary. E. 2 G. 4.* Page 462

INSANITY.

Where the return to a writ of *latitat* stated, that the defendant was insane, and could not be removed without great danger, and continued so till the return of the writ, the Court refused an attachment against the sheriff. *Cavenah v. Collett, H. 1 and 2 G. 4.* 279

INSOLVENT DEBTOR.

1. A creditor of an insolvent trader may, after the debtor's discharge under the 53 G. 3. c. 102., take out a commission of bankruptcy against him; and his debt, although included in the insolvent schedule, will be a sufficient petitioning creditor's debt at law, to support the commission. *Jellis assignee of Routledge v. Mountford, H. 1 and 2 G. 4.* 256
 2. An insolvent debtor having petitioned the insolvent court to be discharged under the act, a creditor gave notice of his intention to oppose him, on the ground that the debt was fraudulently contracted. To induce the latter to withdraw his opposition, the insolvent agreed to execute, within three days after his discharge, a warrant of attorney for the debt, and, in the mean time, to give a promissory note of a third person for the amount, which was to be delivered up on the execution of the warrant of attorney. The insolvent was discharged, and the warrant of attorney was executed
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on the delivery up of the note. The Court set aside the warrant of attorney, and the judgment entered up thereon, on the ground that the agreement on which they were founded was contrary to the policy of the insolvent act, inasmuch as it enabled the creditor to take to himself a large portion of the future effects, which the legislature intended to be distributed among all the creditors. *Jackson v. Davison, T. 2 G. 4.* Page 691

INSURANCE,

See LICENCE.

- 1 Policy of insurance from *Para* to *New York*, with leave to call at any of the *Windward* and *Leeward* islands on the passage, and to discharge, exchange, and take on board the whole or any part of any cargo, at any ports or places, particularly at all or any of the *Windward* and *Leeward* islands, without being deemed any deviation: Held, on this policy, the ship having proceeded to two of the *Leeward* islands for a purpose wholly unconnected with the voyage, that it was a deviation, and vitiated the insurance. *Hammond v. Reid, M. 1 G. 4.* 72
 2. Upon a policy effected after the declaration of war by *America*, but before it was known in *England*, where it was not stated in the policy, nor communicated to the underwriter, that the assured was an *American* subject, and the loss happened in consequence of a seizure by the *American* government for a forfeiture for the breach of their non-importation act: Held, that the action could not be maintained, even after the war had terminated. *Campbell v. Innes, E. 2 G. 4.* 423
 3. The importation of goods from
- 3 C Ame-

718 INSURANCE BROKER.

America, in a vessel *American* built, though owned by *British* subjects, is not legalized by 49 G. 3. c. 59. *Same v. Same*, E. 2 G. 4. Page 436

4. Where the memorandum for charter stated one half of the freight to be paid in cash on unloading and right delivery, and the remainder by bill on *London* at four months' date; and then, after containing stipulations for unloading, discharging, demurrage, &c., added, "the captain to be supplied with cash for the ship's use;" and in pursuance of the last stipulation, the master drew a bill on the freighters, which was duly accepted and paid: Held, that this was not to be considered a payment of freight in advance, but as a loan to the owner of the ship, and that (the ship having been lost on her homeward voyage) the freighters had no insurable interest in such bill. *Manfield v. Maitland*, T. 2 G. 4. 582

INSURANCE BROKER.

1. An insurance broker is only entitled to receive payment for the assured from the underwriter in money; and therefore, a custom to set off the general balance due from the broker to the underwriter in the settlement of a particular loss is illegal. *Todd v. Reid*, H. 1 and 2 G. 4. 210
2. A policy delivered to an insurance broker for the purpose of settling a loss, is adjusted by the underwriter, payable at a month. The broker charges the underwriter in account for the loss, and transmits to the assured an account in which he states himself to be debtor for the amount of the loss: and for the balance of that account the assured draws a bill upon the broker, which the latter accepts, but does not pay. The

JURY.

underwriter's name never having been struck off the policy, it was held that he was not discharged. *Russell v. Bangley*, E. 2 G. 4. Page 395

JURY.

1. Upon the trial of an information for a libel only ten special jurymen appeared, and two talesmen were sworn on the jury. It is no ground for a new trial that two of the non-attending special jurymen named in the pannel had not been summoned, though it appeared that this fact was unknown to the defendant, until after the trial. *The King v. Hunt*, E. 2 G. 4. 430
2. No challenge can be taken either to the array or to the polls, until a full jury have appeared; and therefore, where the challenges are taken previously, they are irregularly made. *The King v. Edmunds and Others*, E. 2 G. 4. 471

The disallowing of a challenge is not a ground for a new trial, but for a venire de novo; and every challenge must be propounded in such a way as that it may be put at the time upon the nisi prius record. So that the adverse party may either demur, or counterplead, or deny the matter of challenge, in which last case only triers are to be appointed; and, therefore, where the challenges were not put on the record, the defendants were held not to be in a condition to ask the opinion of this Court, as a matter of right, upon their sufficiency. *Ibid.*

There can be no challenge to the array on the ground of unindiferency in the Master of the Crown Office, he being the officer of the Court expressly appointed to nominate the jury. The only remedy in such a case is to apply to the Court by motion to appoint some

some other officer to nominate the jury. *Ibid.*

The Master of the Crown Office, in nominating the jury, selected the names of the jurors, and did not take them by chance from the freeholder's book. He also took those only whose names had the addition of "esquire;" and included some persons who were in the commission of the peace: Held, that in so doing he was perfectly right. *Ibid.*

He also included in his nomination some persons, who, as grand jurymen, had found the indictment, and persisted in his opinion as to their sufficiency, unless the crown would consent to abandon them, which was done, and others were then substituted in their places: Held, that he was wrong in his opinion, but that there was no ground for presuming partiality. *Ibid.*

The sheriff's officer had neglected to summon one of the 24 special jurymen returned on the pannel: Held, that this was no ground of challenge to the favour for unindifferency on the part of the sheriff. *Ibid.*

Held, also, that it is not competent to ask jurymen (whether special jurymen or tradesmen) if they have not, previously to the trial, expressed opinions hostile to the defendants and their cause, in order to found a challenge to the polls on that ground; but that such expressions must be proved by extrinsic evidence. *Ibid.*

JUSTICES.

The power given to magistrates, under 35 G. 3. c. 101. s. 2., of ordering the charges incurred during the suspension of an order of removal, to be paid by the parish to which the order is made, is confined to two cases only, viz.

the death or removal of the pauper; and, therefore, where a pauper, during the suspension of an order of removal, became irremovable in consequence of an estate descended to him: Held, that such a case was not within the act; and that the pauper, not having been removed, no order for the payment of any charges incurred during the suspension of the original order of removal could be made. *The King v. The Inhabitants of Chagford*, H. 1 and 2 G. 4. Page 235

LANDLORD AND TENANT.

1. A reasonable time, after the expiration of five days from the time of distress, is by law allowed to the landlord for appraising and selling the goods distrained. *Pitt v. Shew*, H. 1 and 2 G. 4. 208
2. A lease of coal mines reserved a royalty rent for every ton of coals raised, and contained a proviso that the lease should be void, to all intents and purposes, if the tenant should cease working at any time two years. After the working had ceased more than two years, the lessor received rent: Held, that a tenancy from year to year was not thereby created; for the lease was not absolutely void by the cesser to work, but voidable only at the option of the lessor; and that he might avoid the lease upon any cesser to work commencing two years before the day of demise in the ejectment. *Doe, dem. Bryan, v. Bancks*, E. 2 G. 4. 401
3. Upon a parol demise rent to take place from the following *Lady-day*, evidence of the custom of the country is admissible, to shew that by "*Lady-day*" the parties meant "*Old Lady-day*." *Doe, dem. Hall, v. Benson*, T. 2 G. 4. 588.

LEASE,

See LANDLORD AND TENANT, 2.

LIBEL.

1. On an information for writing, composing, and publishing a libel in the county of *L.*, it appeared that the defendant, on the 22d *August*, wrote and composed the libel in *L.*, and that he was seen in *L.* on that and the following day. On the 24th, the libel was delivered in the county of *M.* (100 miles off) by *A.* to *B.*, being inclosed in an envelope addressed to *A.*, containing written directions to *A.* to forward the libel to *B.*, by whom it was subsequently published in *M.* The envelope was open; and it was not proved that there was on it any trace of a seal or post-mark. *A.* was not called at the trial as a witness by either party; nor was it proved that he was a resident, or had been about that time, in *L.*: Held, by three Justices (dissentiente *Bayley J.*), that this was evidence on which the jury might properly be left to presume that the libel was delivered open to *A.* in *L.* *Rex v. Burdett, Bart.* Page 95

Held, also, by three Justices (*Bayley J.* dubitante), that a delivery at the post-office in *L.* of a sealed letter inclosing a libel, is a publication of the libel in *L.*: Held, also, by three Justices (*Bayley J.* dubitante), where a defendant writes and composes a libel in *L.* with the intent to publish, and afterwards publishes it in *M.*, that he may be indicted for a misdemeanour in either county. *Ibid.*

And, *per totam Curiam*, where a libel imputes to others the commission of a triable crime: Held, that evidence of the truth of it is inadmissible.

Held, also, where, in summing up, the Judge told the jury that the intention was to be collected from the paper itself, unless explained by the mode of publication or other circumstances; and that if its contents were likely to excite sedition, &c. defendant must be presumed to intend that which his act was likely to produce; and that, if they found such to be the intent, he was of opinion it was a libel; and that they were to take the law from him, unless they were satisfied that he was wrong; that this was a correct mode of leaving the question to the jury, under 32 G. 3. c. 60. s. 1. *Ibid.*

Quære, Whether the writing and composing of a libel with intent to publish, but not followed by publication, be an offence. *Ibid.*

2. Where an information alleged that a libel was published of and concerning the government of the country, and the libel did not in express terms charge the acts to have been done by the government or its order, the Court are to take the whole libel together, to interpret it in the way in which ordinary persons would understand it, and to judge, from the whole tenor of it, whether it be written of and concerning the government; and the Court having come to this conclusion, such an information was held good after verdict, although the record did not contain any averment of extrinsic facts, in order to shew that the libel was written of and concerning the government. *Rex v. Burdett, Bart.* H. 1 and 2 G. 4.

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Where the information alleged that the defendant, intending to cause it to be believed that divers subjects of our lord the king had been

been inhumanly killed by *certain* troops of our lord the king, published a libel of and concerning the *said* troops; and the only inuendo in the libel was applied to the word *dragoons*, meaning the said troops of our said lord the king, and meaning thereby that divers liege subjects of our lord the king had been inhumanly cut down and killed by the said troops of our said lord the king: Held, after verdict, that this was sufficiently certain, without defining what particular troops were meant.

Ibid.

Where a defendant was convicted of a libel, which, on the face of it, purported to have been written in consequence of his having read a statement of facts in different newspapers, an affidavit that he did read such statements in such newspapers may be received in mitigation of punishment; but an affidavit that the facts contained in those statements were true, is not admissible.

Ibid.

3. Declaration for a libel published in a newspaper. Plea, that the libel was originally published in the *H. Journal* by *I. S.*; and that, at the time of publication by the defendant, it was stated in such publication that it was copied from that newspaper; and that, pursuant to statute 38 G. 3. c. 78., *I. S.* had made an affidavit that he was the publisher of the *H. Journal* and still remained so at the time of publication of the libel: Held, that this plea was bad, inasmuch as the publication by the defendant did not specify by name *I. S.* as the original publisher of the libel, but only named the journal. *Lewis v. Walter*, 1. 2 G. 4. Page 605

Semble, that even if *I. S.* had been named by the defendant

when the latter published the libel, such publication, being of written slander, could not have been justified. *Ibid.*

Semble, also, that the repetition of oral slander, accompanied by a declaration of the name of the original author, cannot be justified, unless such repetition be made without malice, and upon a fair and justifiable occasion. *Ibid.*

The libel stated in the declaration purported to be a speech of counsel at a trial of the plaintiff on a criminal charge; and it stated, after setting out the speech, that a witness was called, who proved all that had been stated by counsel, and that the defendant was immediately after that acquitted upon a defect in proving some matter of form. The plea stated, that in fact such a speech was made, and that the witness called proved all that had been so stated; but it did not set out the evidence, or justify the truth of the charges made in the counsel's speech: Held, that such plea was bad, inasmuch as a party could not be justified in publishing the result of evidence given in a court of justice, but must state the evidence itself. *Ibid.*

LICENCE.

A licence for the exportation of gunpowder was granted on the petition of *A. B.* on behalf of himself and others, on condition that the merchant exporter should give a certain security therein mentioned. *A. B.*, the manufacturer of the gunpowder, sold it to *C. D.*, and contracted to deliver it free on board a ship: Held, that the condition of this licence was not complied with by *A. B.*'s giving the required security, he not being the merchant exporter within the meaning

meaning of the licence. *Camelo v. Britten*, M. 1 G. 4. Page 184

LIEN,

See FREIGHT, 1.

1. The wharfage, &c. due upon goods imported was, by the course of trade, paid by the importer at the Christmas following the importation, whether the goods were in the mean time removed or not. The goods were sold to A., and, after Christmas, the merchant importer became bankrupt: Held, that there was no lien on the goods for the wharfage, &c. as against A. *Cramshay v. Homfray*, M. 1 G. 4. 50
2. A shipwright has a lien upon a ship for repairs. *Franklin v. Hosier*, H. 1 and 2 G. 4. 341
3. The plaintiff, after judgment recovered, settled the action with the defendant, and employed a new attorney to enter up satisfaction on the record: Held, that the defendant was entitled to be discharged out of custody, although the lien of the plaintiff's attorney on the costs had not been satisfied. *Marr v. Smith*, E. 2 G. 4. 466

LIMITATION.

A copyhold was surrendered to the use of husband and wife, for their natural lives and the life of the longer liver of them, and from and after the decease of the survivor of them, to the right heirs of the survivor for ever: Held, that the husband and wife took a vested estate, not only for their joint lives, but also for the life of the survivor, with a contingent remainder in fee to the survivor. *Doe, dem. Dormer, v. Wilson*, H. 1 and 2 G. 4. 303

MANDAMUS.

LIMITATIONS, STATUTE OF.

A party, on being asked for the payment of his attorney's bill, admitted that there had been such a bill, but stated that it had been paid to the deceased partner of the attorney, who had retained the amount out of a floating balance in his hands. *Quere*, whether, in order to take the case out of the statute of limitations, evidence is admissible to shew that the bill had never in fact been paid in this manner.

Semble, that such evidence is admissible, if at all, only where the defendant states the debt to be discharged by particular means, to which he refers with precision, and where he has designated the time and mode so strictly, that it is impossible it could be discharged in any other manner than that specified. *Beale v. Nind*, T. 2 G. 4. Page 568

LORD'S ACT.

Notice under 32 G. 2. c. 28. must be given to a creditor fourteen clear days, exclusive both of the day of service and that of presenting the petition. *Zouch v. Empey*, E. 2 G. 4. 522

MANDAMUS.

1. The Court of K. B. have no jurisdiction to grant a mandamus to magistrates to make an order of maintenance on a particular parish. *The King v. The Justices of Middlesex*, H. 1 & 2 G. 4. 298
2. A mandamus to the mayor of M. to convene a meeting, to proceed to an election, in order to fill up five vacancies in a select body, consisting of fifteen chief burgesses. Return by him, after stating objections to the title of several

MIS-TRIAL.

several of the remaining burgesses, that there were not within the borough eight legally elected chief burgesses by whom the election of others could be made; and that, for the several reasons before mentioned, he could not proceed to such election: Held, insufficient return, and peremptory mandamus awarded. *The King v. The Mayor of Monmouth, E. 2 G. 4.* Page 496

MARKET.

A prescription for toll of corn brought into a town, to be sold on a market day there, whereof any part is pitched within the market for sale, and which shall be there sold, is bad, inasmuch as there cannot be any toll in respect of goods not actually brought into the market. *Wells v. Miles, T. 2 G. 4.* 559

MASTER AND SERVANT

Where defendant's servant wantonly, and not in order to execute his master's orders, strikes the plaintiff's horses, and thereby produces the accident, his master is not liable; but where, in the course of his employment, he so strikes, although injudiciously, his master is liable. *Croft v. Alison, T. 2 G. 4.* 590

MIS-TRIAL.

The record, in a case of felony at the quarter sessions, after stating the indictment, plea of not guilty, and verdict of guilty thereon, added, "that because it appeared to the justices, that after the jury had retired one of them had separated from his fellows, and conversed respecting his verdict with a stranger, it was considered that the verdict was bad;" and it was therefore quashed, and a venire

PARTNERS. 723

de novo awarded to the next sessions. It then proceeded to set out the appearance of the parties at the next sessions, and the trial and conviction by the second jury; whereupon all and singular the premises being seen and considered, judgment was given, &c.: Held, upon a writ of error brought, that the judgment was right. *The King v. Fowler and Sexton, H. 1 and 2 G. 4.* Page 273

NAVIGATION LAWS.

The importation of goods from America, in a vessel American built, though owned by British subjects, is not legalized by 49 G. 3. c. 59. *Campbell v. Innes, E. 2 G. 4.* 426

NEWSPAPER, EDITOR OF,
See LIBEL, 3. CONTEMPT, 1.

NOTICE.

See LORD'S ACT.

PARTNERS.

1. In assumpsit by one of two surviving partners. The fact of the plaintiff's being surviving partner must be stated in the declaration; and therefore a count for goods sold by him to the defendant is not supported by proof that the goods were sold by the plaintiff and his deceased partner. *Jell v. Douglas, E. T. 2 G. 4.* 374
2. The joint owners of a vessel engaged in the whale fishery, may sue a purchaser for the price of whale oil, although the contract of sale were made by one of the part-owners, and the purchaser did not know that other persons had any interest in the transaction. *Skinner v. Stocks, E. 2 G. 4.* 437
3. A merchant in London recommended consignments to a merchant abroad, and it was agreed, that

that the commission on all sales of goods recommended by one house to the other should be equally divided, without allowing any deduction for expenses: Held, that this was a participation in profit, and constituted a partnership between the parties quod hoc. *Cheap v. Cramond*, T. 2 G. 4. Page 663

PORT CHARGES.

See FREIGHT, 1.

PATENT.

A patent for improvements in the construction of ships' anchors, windlasses, and chain-cables, cannot be supported unless there is novelty in each invention; and therefore, where it turned out that there was no novelty in the construction of the anchors, it was held, that the patent was wholly void. *Brunton v. Hawkes*, T. 2 G. 4. 451

PAYMENT.

A policy delivered to an insurance broker for the purpose of settling a loss, is adjusted by the underwriter, payable at a month. The broker charges the underwriter in account for the loss, and transmits to the assured an account, in which he states himself to be a debtor for the amount of the loss; and for the balance of that account the assured draws a bill upon the broker, which the latter accepts, but does not pay. The underwriter's name never having been struck off the policy, it was held that he was not discharged. *Russell v. Bangley*, E. 2 G. 4. 395

PLEADING.

1. The Court will not take judicial notice of the local situation and distances of the different places

PLEADING.

in the counties of England from each other; and therefore where a return to an habeas corpus stated that the prisoner was found on board a vessel, discovered within eight leagues of that part of the coast of G. B. called *Suffolk*, to wit, within eight leagues of O., in that county, it was held not to be averred with sufficient certainty, that the vessel was not within four leagues of the coast of G. B., between the North Foreland in Kent, and Beachy Head in Sussex. *Deybel's case*, H. 1 and 2 G. 4. Page 243

2. A covenant by a lessor to supply the premises demised (which were two houses), with a sufficient quantity of good water, at a rate therein mentioned for each house, is a covenant that runs with the land, and for the breach of which the assignee of the lessee may maintain an action against the reversioner. *Jourdain v. Wilson*, H. 1 and 2 G. 4. Page 266

3. Declaration in assumpsit, charging that the defendant was indebted to the plaintiff in 500 quarts of wheat for tolls, without stating any value, is bad upon special demurrer. *Mayor of Reading v. Clarke*, H. 1 and 2 G. 4. 268

4. The record in a case of felony at the quarter sessions, after stating the indictment, plea of not guilty, and verdict of guilty thereon, added, that because it appeared to the justices, that after the jury had retired, one of them had separated from his fellows, and conversed respecting his verdict with a stranger; it was considered that the verdict was bad, and it was therefore quashed, and a venire de novo awarded to the next sessions. It then proceeded to set out the appearance of the parties at the next

next sessions, and the trial and conviction by the second jury; whereupon all and singular the premises being seen and considered, judgment was given, &c. Held upon a writ of error brought that the judgment was right. *Rex v. Howler and Sexton.* H. 1 and 2 G. 4. Page 273

- 5 Where a return to a habeas corpus stated that a vessel, with smuggled goods on board, was found at the fish-market, within the limits of the ancient town of *Rye*: Held, that it did not come within the 24 G. 3. sess. 2. c. 47. s. 1., by which, if a vessel be found at anchor, or hovering within the limits of any of the ports of this kingdom, or within four leagues of the coast thereof, with smuggled goods on board, she becomes liable to forfeiture. *Souden's case.* H. 1 and 2 G. 4.

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6. Where the return to a habeas corpus stated that an *English* seaman being found on board a ship liable to forfeiture under 45 G. 3. c. 121. s. 1., was carried before a magistrate, and upon due proof, as by the statute in that case made and provided is required, was committed, &c.: Held, that this was insufficient; and that it was necessary to state distinctly what proof was given, in order that the Court might see whether it was the due proof required by the 7th section of the act. *Nash's case,* H. 1 and 2 G. 4. 295

7. Where an information alleged, that a libel was published of and concerning the government of the country, and the libel did not, in express terms, charge the acts to have been done by the government or its order, the Court are to take the whole libel together, to interpret it in the way in which ordinary persons

would understand it, and to judge from the whole tenor of it, whether it be written of and concerning the government; and the Court having come to this conclusion, such an information was held good after verdict, although the record did not contain any averment of extrinsic facts, in order to shew that the libel was written of and concerning the government. *Rex v. Burdett, Bart.* H. 1 and 2 G. 4. P. 314

Where the information alleged, that the defendant intending to cause it to be believed, that divers subjects of our lord the king had been inhumanly killed by *certain* troops of our lord the king, published a libel of and concerning the *said* troops; and the only inuendo in the libel was applied to the word *dragoons*, meaning the said troops of our said lord the king, and meaning thereby, that divers liege subjects of our lord the king had been inhumanly cut down and killed by the said troops of our said lord the king: Held, after verdict, that this was sufficiently certain, without defining what particular troops were meant. *Ibid.*

8. In assumpsit by the provisional assignee of a bankrupt, defendant pleaded the general issue: Held, that the fact of the bankrupt's estate having been assigned by the provisional assignee to the new assignees, between the time of issuing the writ and the delivery of the declaration, is no ground of nonsuit upon a plea of non-assumpsit. Quære, whether it would have been an answer to the action, if specially pleaded? *Page v. Bauer, E.* 2 G. 4. P. 345

9. In assumpsit by one of two surviving partners. The fact of the plaintiff's being surviving partner must be stated in the declaration; and

- and therefore a count for goods sold by him to the defendant is not supported by proof that the goods were sold by the plaintiff and his deceased partner. *Jell v. Douglas*, E. 2 G. 4. Page 374
10. Declaration stated that defendant bargained for and bought of plaintiffs a quantity of *E. I.* rice, according to the conditions of sale of the *E. I.* Company, to be put up at the next *E. I.* Company's sale by the proprietors, if required, at a certain price there mentioned. The proof was, that the rice was sold per sample. This is no variance; the words "per sample" not being matter of description, but a collateral engagement that the goods sold shall correspond with the sample. *Parker v. Palmer*, E. 2 G. 4. 387
11. Husband and wife lived separate under a deed, by which he stipulated that his wife should enjoy, as her separate and distinct property, all effects, &c. which she might acquire, or which by any gift, grant, &c. or representation, she, or he in her right, might be entitled to; and that he would not do any act to impede the operation of that deed, but would ratify all lawful or equitable proceedings to be brought in his or their names, for recovering such real and personal estates; and the wife having, as executrix of *R. M.*, commenced an action on a promissory-note against defendants in the names of her husband and herself, the husband released the debt, which release was pleaded *puis darrein continuance*. The Court, on application, ordered such plea to be taken off the record, and the release to be given up to be cancelled. *Innell v. Newman*, E. 2 G. 4. Page 419
12. In assumpsit for not indemnifying plaintiff in consequence of

- his having become bail for *A.*, in an action at the suit of *B.*, it was stated that *B.*, in *Michaelmas* term, 58 G. 3., recovered against plaintiff. The judgment given in evidence was in *Hilary* term: Held, that this was no variance, inasmuch as this was not matter of description, but an allegation in substance, that the judgment had been obtained before the commencement of the action. *Phillips v. Shaw*, E. 2 G. 4. Page 435
13. The joint owners of a vessel engaged in the whale fishery may sue a purchaser for the price of whale oil, although the contract of sale were made by one of the part-owners, and the purchaser did not know that other persons had any interest in the transaction. *Skinner v. Stocks*, E. 2 G. 4. 437
14. A prescription for toll of corn brought into a town to be sold on a market day there, whereof any part is pitched within the market for sale, and which shall be there sold, is bad, inasmuch as there cannot be any toll in respect of goods not actually brought into the market. *Wells v. Miles*, T. 2 G. 4. 559
15. Where the plaintiffs hired a chariot for the day, appointed the coachman, and furnished the horses: Held, that they were properly described as owners and proprietors of it, in a declaration against a defendant for an accident arising from his servant's negligence in driving against the chariot.
- Held also, that where defendant's servant wantonly, and not in order to execute his master's orders, strikes the plaintiff's horses, and thereby produces the accident, his master is not liable; but where, in the course of his employment, he so strikes, although injudiciously, his master is

is liable. *Croft v. Alison*, T. 2 G. 4. Page 590

16. Declaration for a libel published in a newspaper. Plea, that the libel was originally published in the *H. Journal* by I. S.; and that at the time of publication by the defendant, it was stated in such publication that it was copied from that newspaper; and that, pursuant to stat. 38 G. 3. c. 78., I. S. had made an affidavit that he was the publisher of the *H. Journal*, and still remained so at the time of publication of the libel: Held, that this plea was bad, inasmuch as the publication by the defendant did not specify by name I. S. as the original publisher of the libel, but only named the journal.

Semble, that even if I. S. had been named by the defendant when the latter published the libel, such publication, being of written slander, could not have been justified.

Semble, also, that the repetition of oral slander, accompanied by a declaration of the name of the original author, cannot be justified unless such repetition be made without malice, and upon a fair and justifiable occasion.

The libel stated in the declaration, purported to be a speech of counsel at a trial of the plaintiff on a criminal charge; and it stated, after setting out the speech, that a witness was called, who proved all that had been stated by counsel, and that the defendant was immediately after that acquitted, upon a defect in proving some matter of form. The plea stated, that in fact such a speech was made, and that the witness called, proved all that had been so stated; but it did not set out the evidence, or justify the truth of the charges

made in the counsel's speech: Held, that such plea was bad, inasmuch as a party could not be justified in publishing the result of evidence given in a court of justice, but must state the evidence itself. *Lewis v. Walter*, T. 2 G. 4. Page 605

17. In a plea by the inhabitants of a county, that the inhabitants of a particular township have immemorially repaired the highway at the end of a county bridge situate within the township, it is not necessary to state any consideration for such prescription. *Rea v. Inhabitants of West Riding*. T. 2 G. 4. 623

18. A plea of foreign attachment stated the custom to be, that if the plaintiff in the Mayor's Court allege that any other person or persons owes or owe to the then defendants any money that may be attached, and that the plaintiff below alleged, that he and another person owed to the defendant below a certain sum of money: Held that such plea is bad, inasmuch as the person owing the money to the defendant must, within the custom as pleaded, be a different person from the plaintiff.

Quære, whether a custom for a party to attach money in the hands of himself and partner, could be supported. *Nonell v. Hullett*, T 2 G. 4. 646

19. Declaration stated, that plaintiff had cohabited with defendant as his mistress, and that it was agreed that no further immoral connection should take place between them, and that defendant should allow her an annuity as long as she should continue of good and virtuous life and demeanour; and thereupon, in consideration of the premises, and that the plaintiff would give up the annuity, defendant promised

- to pay as much as the annuity was reasonably worth: Held bad upon general demurrer. *Blinnington v. Wallis*, T. 2 G. 4. Page 650
20. Declaration in debt for tithes under 2 and 3 *Edw. 6. c. 13. s. 1.* omitting to state that the tithes had been yielded and paid, and of right ought to have been paid within 40 years next before the passing of the act is bad even after verdict. *Butt v. Howard*, T. 2 G. 4. Page 655

POOR.

1. A select vestry for the management of the parish affairs existing by ancient custom, cannot elect another select vestry for the management of the poor within the 59 G. 3. c. 12. *The King v. Woodman and Others*, E. 2 G. 4. 507
2. Where a pauper, legally settled in the parish of A., having met with a severe accident in the parish of B., was carried into an adjacent parish to be cured, and remained there for a long period of time: Held, that he was to be considered as casual poor in the parish of C., and was irremovable; and that an order of removal to A., suspended, under the powers of 35 G. 3. c. 101., and a subsequent order on the overseers of A. to pay the intermediate charges incurred by the parish of C., were invalid. *The King v. The Inhabitants of St. Lawrence, Ludlow*, T. 2 G. 4. 660

PRACTICE.

See JURY.

1. Where the employment of an attorney is so connected with his professional character, as to afford a presumption that his employment was in consequence of that character, the Court will inter-

- fere in a summary way to compel him faithfully to execute the trust reposed in him; and, therefore, where an attorney was employed by A., to collect and get in the effects due to him as administrator of another person, the Court compelled the attorney to render an account to the executors of A. of the monies, &c. received by him, although he had never been employed by A. or his executors to conduct any suit in law or equity on his or their behalf. *Aitkin, In the Matter of the Executors of*, M. 1 G. 4. P. 47
2. An attorney in custody for debt loses his privilege, and may be detained upon mesne process. *Byles v. Wilton, Gent. one, &c.* M. 1 G. 4. 88
 3. An agent employed to take out an attorney's annual certificate, having neglected so to do, and the attorney having from ignorance of the fact continued to practise, the Court will only allow him to be re-admitted upon payment of the arrears, and a fine. *Ex parte Leacroft*, M. 1 G. 4. 90
 4. The bail to the sheriff are discharged by the defendants giving a cognovit for payment of debt and costs. *Farmer v. Thorley*, M. 1 G. 4. 91
 5. This Court will set aside a judgment founded on an usurious security, without compelling the defendant to pay the principal and interest. *Roberts v. Goff*, M. 1 G. 4. 92
 6. Defendant having pleaded in abatement, that four others were jointly liable with himself, the plaintiff applied to the defendant's attorney to give the places of residence, and additions of those persons, which he refused, unless the action were discontinued. Under these circumstances, the Court

Court made a rule absolute for the defendant to deliver such particulars, or in default thereof, for setting aside the plea. *Taylor and Others v. Harris*, M. 1 G. 4. Page 93

7. A court of general gaol delivery has the power to make an order to prohibit the publication of the proceedings pending a trial likely to continue for several successive days, and to punish disobedience to such order by fine.

Service of an order of such court, calling upon the editor of a newspaper "to answer for contemptuously publishing such proceedings," at the office at which the newspaper was published, is good service within the 38 G. 3. c. 78. s. 12.; and the editor not having appeared, the fine was held to be properly imposed upon him in his absence. *The King v. Clement*, H. 1 and 2 G. 4. 218

8. The proceedings in an action on the bail bond having been stayed, the defendant pleaded to the original action, the general issue, and subsequently a plea of bankruptcy, puis darrein continuance. There being no affidavit, that the application to stay the proceedings was made on the part of the bail, the Court now set aside the latter plea, and restrained the defendant to his plea of general issue, on the ground, that when the proceedings were stayed in the action on the bail bond, it was intended that the defendant should only question the validity of the original debt. *Dowson v. Levi*, H. 1 and 2 G. 4. 249

9. The record in a case of felony at the quarter sessions, after stating the indictment, plea of not guilty, and verdict of guilty thereon, added, "that because it appeared to the justices, that after the jury had retired, one of

them had separated from his fellows, and conversed respecting his verdict with a stranger, it was considered that the verdict was bad;" and it was therefore quashed, and a venire de novo awarded to the next sessions. It then proceeded to set out the appearance of the parties at the next sessions, and the trial and conviction by the second jury; whereupon all and singular the premises being seen and considered, judgment was given, &c.: Held, upon a writ of error brought, that the judgment was right. *The King v. Fowler and Sexton*, H. 1 and 2 G. 4. Page 273

10. Where the return to a writ of latitat stated that the defendant was insane, and could not be removed without great danger, and continued so till the return of the writ, the Court refused an attachment against the sheriff. *Cavenagh v. Collett*. H. 1 and 2 G. 4. 280

11. A writ returnable on a dies non is altogether void, and cannot be amended by the Court. *Kenworthy v. Peppiat*, H. 1 and 2 G. 4. 288

12. The notice required by 13 G. 2. c. 18. s. 5. for removing an order of justices by certiorari, must state on the face of it the name of the party applying for the writ. *The King v. The Justices of Lancashire*, H. 1 and 2 G. 4. 289

13. The Court will not compel the vestry clerk of a parish to produce, and permit copies to be taken of, documents from the parish chest in his custody, for any other than parochial purposes. *May v. Gwynne*, H. 1 and 2 G. 4. 301

14. Where a defendant was convicted of a libel, which, on the face of it, purported to have been written in consequence of his

his having read a statement of facts in different newspapers, an affidavit that he did read such statements in such newspapers, may be received in mitigation of punishment; but an affidavit that the facts contained in those statements were true, is not admissible.

The King v. Burdett, H. 1 and 2 G. 4. Page 314

15. A judge at nisi prius has the power of fining a defendant for a contempt committed by him in the course of addressing the jury.

The King v. Davison, H. 1 and 2 G. 4. 329

16. The Court may order a verdict to be entered for the plaintiff, where the cause was undefended at nisi prius, and the judge directed a nonsuit, with liberty to the plaintiff to move to enter a verdict. *Treacher v. Hinton*, E. 2 G. 4. 413

17. Husband and wife lived separate under a deed, by which he stipulated that his wife should enjoy, as her separate and distinct property, all effects, &c. whichs he might acquire, or which by any gift, grant, &c. or representation, she, or he in her right, might be entitled to; and that he would not do any act to impede the operation of that deed, but would ratify all lawful or equitable proceedings to be brought in his or their names, for recovering such real and personal estates; and the wife having, as executrix of R.M., commenced an action on a promissory-note against defendants, in the names of her husband and herself, the husband released the debt; which release was pleaded puis darrein continuance. The Court on application, ordered such plea to be taken off the record, and the release to be given up to be cancelled. *Innell v. Newman*, E. 2 G. 4. 419

18. The plaintiff, after judgment recovered, settled the action with the defendant, and employed a new attorney to enter up satisfaction on the record: Held, that the defendant was entitled to be discharged out of custody, although the lien of the plaintiff's attorney on the costs had not been satisfied. *Marr v. Smith*, E. 2 G. 4. Page 466

19. Notice under 32 G. 2. c. 28, must be given to a creditor fourteen clear days exclusive both of the day of service and that of presenting the petition. *Zouch v. Empsey*, E. T. 2 G. 4. 522

20. Plaintiff in an inferior court, from which a cause is removed by habeas corpus, and a rule for better bail given, is not entitled to a procedendo, after render of defendant and notice of such render, although the render be made after the day on which the rule for better bail expires. *Johnson v. Walker*, E. 2 G. 4. 535

21. An arrest of a party, described in a testatum special capias, and in the affidavit to hold to bail, by the initials of his Christian name only, is irregular. *Reynolds v. Haukin*, E. 2 G. 4. 536

22. An alias scire facias issued against bail must be left at the sheriff's office four days, exclusive both of the day of lodging it and the day of the return. *Wilson v. Farr*, E. 2 G. 4. 537

23. Delivery of declaration in ejectment to an agent of tenant in possession, who resided abroad, is sufficient to entitle the plaintiff to judgment against the casual ejector. *Doe v. Roe*, T. 2 G. 4. 653

24. An insolvent debtor having petitioned the insolvent court to be discharged under the act, a creditor gave notice of his intention to oppose him, on the ground that
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the debt was fraudulently contracted. To induce the latter to withdraw his opposition, the insolvent agreed to execute, within three days after his discharge, a warrant of attorney for the debt, and, in the mean time, to give a promissory note of a third person for the amount, which was to be delivered up on the execution of the warrant of attorney. The insolvent was discharged, and the warrant of attorney was executed on the delivery up of the note. The Court set aside the warrant of attorney, and the judgment entered up thereon, on the ground that the agreement on which they were founded was contrary to the policy of the Insolvent act, inasmuch as it enabled the creditor to take to himself a large portion of the future effects which the legislature intended to be distributed among all the creditors. *Jackson v. Davison*, T. 2 G. 4. Page 691

PROMISSORY NOTE.

1. A promissory note for the payment of 30%, at three months after date, with interest from the date, requires a stamp applicable to a note not exceeding 30%. *Pruesing v. Ing*, H. 1 and 2 G. 4. 204.
2. A promissory note, payable two months after sight, requires a stamp appropriated to a note, payable more than 60 days after sight, or two months after date, date and sight not being in this case synonymous. *Sturdy v. Henderson*, T. 2 G. 4. 592
3. Where a note stated that J. S. promised to pay to A. B., or order, a certain sum, and was signed J. S. or else J. G.: Held, that this was not a promissory note by J. G. within the statute of *Anne*, *Ferris v. Bond*, T. 2 G. 4. 679

RECTOR,

See ACTION ON THE CASE, 3.

REMOVAL, ORDER OF.

The power given to magistrates, under 35 G. 3. c. 101. s. 2., of ordering the charges incurred during the suspension of an order of removal, to be paid by the parish to which the order is made, is confined to two cases only, viz. the death or removal of the pauper; and, therefore, where a pauper, during the suspension of an order of removal, became irremovable in consequence of an estate descending to him: Held that such a case was not within the act; and that the pauper not having been removed, no order for the payment of any charges incurred during the suspension of the original order of removal, could be made. *The King v. The Inhabitants of Chagford*, H. 1 and 2 G. 4. Page 235

RULES OF COURT. 196. 539

SCIRE FACIAS,

See PRACTICE, 22.

SCOTCHMAN,

See SETTLEMENT, 1.

SESSIONS,

See APPEAL, NOTICE OF, 1.

1. The Court of K. B. has no jurisdiction to review the judgment of the quarter sessions, except on a case sent up for their consideration; and, therefore, where the sessions, having heard the witnesses on one side, had refused to hear those on the other side in an appeal, on the ground that their testimony had been prefaced by observations on the part of the advocate contrary to their usual

usual practice, the Court refused to grant a mandamus to rehear the appeal. *The King v. The Justices of Carnarvon*, M. 1 G. 4.

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2. By 50 G. 3. c. 48. s. 25 it is provided, that any party aggrieved by the conviction under that act, who shall enter into a recognizance to appear at the next sessions, shall be at liberty to appeal to such sessions: Held, that this dispenses with the necessity of any notice of appeal; and that if the party duly enter into the recognizance, the sessions are bound to hear the appeal. *The King v. The Justices of Essex*, H. 1 and 2 G. 4.

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3. Where, by charter, the magistrates of a borough, which was a county of itself, held only general sessions twice a year, and not quarter sessions: Held, that an appeal against an order of removal might be made to the next general sessions of the peace for such borough. *The King v. The Justices of Carmarthen*, H. 1 and 2 G. 4.

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SETTLEMENT.

By stat. 59 G. 3. c. 12. s. 38., the wife and eight unemancipated children of a Scotchman, who has not acquired any settlement in England, must, if chargeable, be sent, by a pass, along with the husband to Scotland, and cannot be removed to the maiden-settlement of the wife. *The King v. The Inhabitants of Leeds*, E. 2 G. 4.

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SETTLEMENT — By executing an Office.

Where a pauper was legally sworn as a horsholder at a court-leet, and after executing the office for

SETTLEMENT.

a few days, was afterwards irregularly, by two magistrates, discharged from executing his office, and another person appointed, but he acquiesced in this, and did not in fact afterwards execute the office: Held, that this was not executing an annual office within the parish so as to confer a settlement. *The King v. The Inhabitants of Holy Cross, Westgate*, T. 2 G. 4.

Page 619

SETTLEMENT — By Apprenticeship.

By an indenture of apprenticeship it was stipulated, that the master should provide meat, &c. during the term, except in the winter seasons, when the ship to which the apprentice belonged should be laid by unrigged; during which time the apprentice was to be maintained by himself or friends, the master paying a compensation. Under this stipulation, the apprentice, during the winter, resided with his parents in the township of B. for more than forty days, not doing any work for his master during such residence: Held, that this was not a residence under the indenture, and conferred no settlement. *The King v. The Inhabitants of Brompton*, M. 1 G. 4.

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SETTLEMENT — By Hiring and Service.

A pauper having hired himself without specifying any time, entered into the service the day before New-year's Day, and quitted two days after Christmas, receiving his full wages: that being the usual time that servants in that part of the country go into and leave their places. The Court thought that this was a contract which had arrived

arrived at its termination before the expiration of a year; but the sessions having expressly found it to be a hiring and service for a year, the Court considered themselves as bound by that finding. *The King v. The Inhabitants of Tyrley*, T. 2 G. 4. Page 624

SETTLEMENT — *By renting a Tenement.*

A pauper having hired a tenement of more than 10*l.* a-year, resided in it more than forty days altogether, but only thirty-eight days before the passing of the 59 G. 3. c. 50.: Held that this conferred no settlement. *The King v. The Inhabitants of St. Mary-le-Bone*, T. 2 G. 4. 681

SHIP-OWNER.

A ship-owner is liable for necessary repairs done to a ship by the master's order, and the word "necessary" means such as are fit and proper for the vessel upon her voyage, and such as a prudent owner himself, if present, would order. *Webster v. Seekamp*, E. 2 G. 4. 352

STAMP.

1. A promissory note for the payment of 30*l.* at three months after date, requires a stamp applicable to a note not exceeding 30*l.* *Pruessing v. Ing*, H. 1 and 2 G. 4. 204
2. An act of parliament provided that the M. Canal Company should not take any higher or greater rate of tonnage than should, for the time being, be taken by the B. Canal Company; and the latter, by a resolution at a general assembly, and under their common seal, reduced their tolls: Held, that the M. Canal Company could not question collater-

ally the validity of such resolution, but were bound by it.

The B. Canal Company's act directed that no reduction of the tolls should take place, unless assented to by two-thirds of the proprietors; but allowed them to vote by proxy, a form for which instrument was given by the act. Quære, whether such instrument requires to be stamped? *The Monmouthshire Canal Company v. Kendall*, E. 2 G. 4. Page 453

3. A promissory note, payable two months after sight, requires a stamp appropriated to a note payable more than sixty days after sight, or two months after date, and sight not being in his case synonymous. *Sturdy v. Henderson*, T. 2 G. 4. 592

SURRENDER OF COPYHOLD,

See LIMITATION.

TRESPASS,

See COSTS, 1.

In trespass, the declaration was for taking goods, chattels, and effects: Held, that the plaintiff might recover the value of fixtures under these words. *Pitt v. Shew*, H. 1 and 2 G. 4. 206

TITHES,

See PLEADING, 20.

TOLL,

See MARKET.

TROVER.

An exchequer bill, the blank in which was not filled up, having been placed for sale in the hands of A., he, instead of selling it, deposited it at his banker's, who made him advances to the amount of its value. It was held by three Justices,

Justices, *Bayley J.* dissentiente, that the owner of the exchequer bill could not maintain trover against the bankers, the property in such exchequer bill, like bank notes and bills of exchange indorsed in blank, passing by delivery. *Wookey v. Pole, M. 1 G. 4.* Page 1

VARIANCE.

1. Declaration stated, that defendant bargained for and bought of plaintiffs a quantity of *E. I.* rice, according to the conditions of sale of the *E. I.* Company, to be put up at the next *E. I.* Company's sale by the proprietors, if required, at a certain price there mentioned. The proof was, that besides these conditions, the rice was sold per sample. This is no variance; the words "per sample" not being a description of the commodity sold, but a collateral engagement that it shall be of a particular quality. *Parker v. Palmer, E. 2 G. 4.* 387
2. In assumpsit for not indemnifying plaintiff in consequence of his having become bail for *A.* in an action at the suit of *B.*, it was stated that *B.*, in *Michaelmas* term, 58 *G. 3.*, recovered against plaintiff. The judgment given in evidence was in *Hilary* term: Held, that this was no variance, inasmuch as this was not matter of description, but an allegation in substance that the judgment had been obtained before the commencement of this action. *Phillips v. Shaw, E. 2 G. 4.* 435

VENDOR AND VENDEE.

1. A defendant bargained for and bought of the plaintiffs a quantity of *E. I.* rice, per sample. The

rice did not correspond with the sample; but the defendant, after seeing fresh samples, inferior in quality to the original purchase-sample, put it up at the *E. I.* Company's sale, at a limited price; and no bidding taking place to that extent, he bought it in: Held, that he could not afterwards repudiate the contract. *Parker v. Palmer, E. 2 G. 4.*

Page 387

2. A quantity of oats, having been consigned by a merchant abroad, to be sold by *J. S.*, who was a merchant as well as factor, he placed them in the hands of *A.*, a corn factor, as a security for advances made by him; but the oats were not to be sold without the consent of *J. S.* They remained in *A.*'s possession upon these terms, for nine months, when they were transferred to *A.* by a sale at the market price. No money actually passed, nor were any account-sales rendered; but the amount of the price was allowed in account between *J. S.* and *A.*, leaving a balance in favour of the latter: Held, that this was in substance a pledge, and not a sale by the factor; and that no property passed to *A.*, although the jury had found it to be a bona fide transaction. *Kuckein v. Wilson, E. 2 G. 4.* 443

VESTRY.

1. The Court will not compel the vestry clerk of a parish to produce, and permit copies to be taken of, documents from the parish chest in his custody, for any other than parochial purposes. *May v. Gwynne, H. 1 and 2 G. 4.* 301
2. A select vestry for the management of the parish affairs, existing by ancient custom, cannot elect another

another select vestry for the management of the poor, within the 59 G. 3. c. 12. *The King v. Woodman*, E. 2 G. 4. Page 507

USURY.

The Court will set aside a judgment founded on an usurious security, without compelling the defendant to pay the principal and interest. *Roberts v. Goff*, M. 1 G. 4. 92

WILL.

1. A testator, by his will, devised to *Matthew W.*, his brother, and *Simon W.*, his brother's son, a certain estate. It appeared that the testator had three brothers, each of whom had a son of the name of *Simon* living at the time of the testator's death: Held, that the proof of this fact did not raise any latent ambiguity in the will, so as to let in parol evidence of declarations of the testator as to the person intended, it being clear that the person entitled was *Simon*, son of *Matthew*. *Doe, dem. Westlake, v. Westlake*, M. 1 G. 4. 57
2. By letters patent, 24 Car. 2., the king granted to the use of *A.*, his heirs and assigns, for ever, an annuity of 1000*l.*, to be paid out of

his revenue of four and a half per cent., at *Barbadoes* and the *Leeward Islands*: Held, that this annuity was personal property, and duly passed under a will attested by two witnesses, by a residuary clause bequeathing all the rest, residue, and remainder of a testatrix's personal estate, of what nature or kind soever, to her executors. *Aubin v. Daly*, M. 1 G. 4. Page 59

3. Where a testator bequeathed all his houses and premises in *W.* to his wife for life; and, at her decease, to go to his eldest son, or surviving sons; and, in lack of sons, to daughters; and his copyhold land at *L.* to his eldest son; and, in case of his decease, to the eldest, and so on in rotation; and, in lack of sons, to daughters; and directed his personal property to be equally divided among the remaining children: Held, that the son who at the death of the testator was the eldest, under the will, and as heir at law, took a fee in the premises at *W.*, subject to his mother's life estate, and a fee in the copyhold land at *L.* *Wright Stevens, T.* 2 G. 4. 574

WRIT,

See PRACTICE, 11.

